

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1140

To be argued by
ANGUS MACBETH

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1140

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID STIRLING, JR., WILLIAM G. STIRLING,
HAROLD M. YANOWITCH, EDWIN J. SCHULZ
and RUBEL L. PHILLIPS,

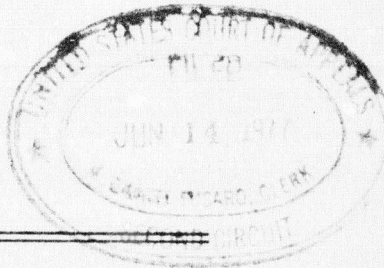
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ANGUS MACBETH,
W. CULLEN MACDONALD,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*



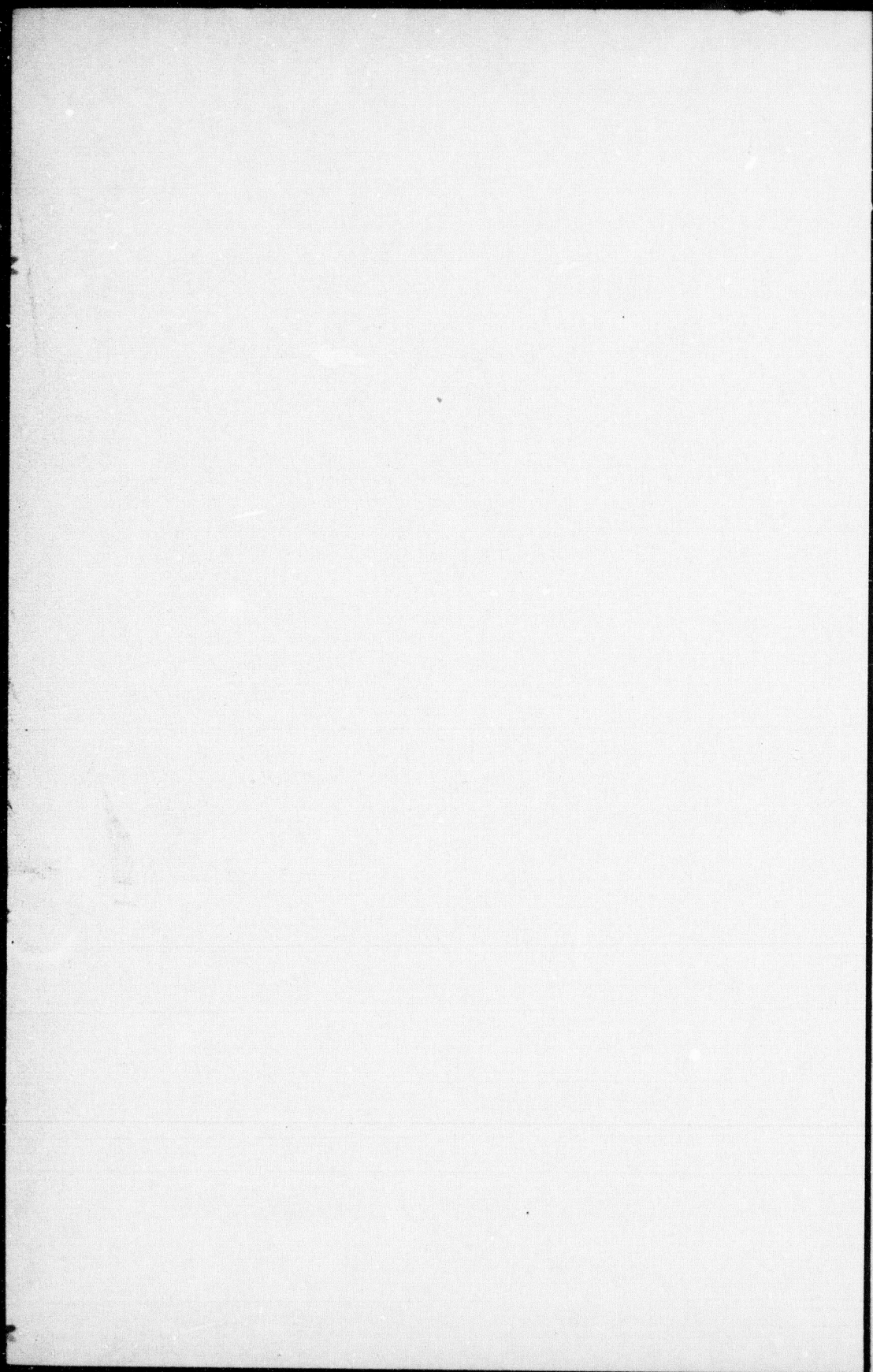


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1140

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID STIRLING, JR., WILLIAM G. STIRLING, HAROLD M.
YANOWITCH, EDWIN J. SCHULZ and RUBEL L. PHILLIPS,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

David Stirling, Jr., William G. Stirling, Harold M. Yanowitch, Edwin J. Schulz and Rubel L. Phillips appeal from judgments of conviction entered on March 11, 1977, in the United States District Court for the Southern District of New York after a six week trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 76 Cr. 685, filed July 27, 1976, in nine counts charged each of the defendants with conspiracy, mail and securities fraud in connection with the sale of securities of the Stirling Homex Corporation ("Homex"). Count One charged the defendants with having devised a multi-million dollar scheme to defraud the public investing in Homex securities in violation of Title

15, United States Code, Sections 77q(a) and 77x; Count Two charged the defendants with making false statements in a Homex registration statement filed with the SEC in violation of Title 15, United States Code, Section 77x; Counts Three through Eight charged a mail fraud scheme in violation of Title 18, United States Code, Section 1341; and Count Nine charged a conspiracy to defraud the United States and to violate Sections 1001 and 1341 of Title 18 and Sections 77q(a), 77x and 78ff of Title 15, United States Code, in violation of Title 18, United States Code, Section 371. (St-YApp. 2; PApp. 2; ScApp. 3).*

Trial commenced on December 22, 1976 and concluded on January 29, 1977, with verdicts of guilty on all counts.

On March 11, 1977, Judge Frankel sentenced the defendants. On Counts One through Eight David Stirling, Jr. received one year concurrent terms of imprisonment and concurrent fines totaling \$10,000, to be followed by a one year period of unsupervised probation, imposition of sentence being otherwise suspended on Count Nine; William G. Stirling received on each of Counts One through Eight six month concurrent terms of imprisonment and concurrent fines totaling \$5,000, to be followed by a one year period of unsupervised probation, imposition of sentence being otherwise suspended on Count Nine; Yanowitch received on each of Counts One through Eight one year concurrent terms of imprisonment and concurrent fines totaling \$2,000, to be followed by a one year period of supervised probation,

* All references in the form "App." are to the indicated defendant's appendix; "Tr." refers to the trial transcript; "GX", "DX" and "CTF" refer to government's, defendant's and Court's exhibits, and "Br." refers to the indicated defendant's brief.

imposition of sentence being otherwise suspended on Count Nine; Phillips received on each of Counts One through Eight ten month concurrent terms of imprisonment and concurrent fines totaling \$5,000, to be followed by a one year period of supervised probation, imposition of sentence being otherwise suspended on Count Nine; and Schulz received a suspended sentence on all nine counts and supervised probation for one year.

All defendants are enlarged on bail pending appeal.

Statement of Facts

Synopsis

The Stirling Homex Corporation, from beginning to end, was a massive fraud conceived and executed by the defendants, who were the principal Homex executive officers and controlling shareholders.* In two separate underwritings, in 1970 and 1971 Homex stock was sold to the public for a sum aggregating \$39,000,000, to the considerable financial advantage of the defendants. Bankruptcy proceedings were commenced in July, 1972.

* David Stirling, Jr., was chairman of the board, chief executive officer and owner of approximately 2 million shares of common stock; William G. Stirling was president, chief operating officer, a director and the owner of approximately 2 million shares of common stock; Yanowitch, a New York attorney, was executive vice-president, general counsel, a director and the owner of approximately 160,500 shares of common stock, together with an option to purchase an additional 50,000 shares; Schulz was senior vice-president of operations, controller, principal accounting officer and the owner of approximately 3200 shares of common stock, together with an option to purchase an additional 20,000 shares; and Phillips, a Mississippi attorney, was the southern region vice-president and the owner of an option to purchase 40,000 shares of common stock.

The trial proof showed a carefully calculated plan to create the wholly erroneous impression that Homex was in a sound and steadily improving economic position, when in fact the reverse was true. Homex was represented to be primarily in the business of manufacturing and installing factory-built, modular houses. Initially housing sales were boosted by sales of land with undisclosed conditions. Later, the housing sales themselves were falsified. Homex's auditors were misled as to the accounting principles being applied to modular sales, genuine and fraudulent alike. Throughout these endeavors, the defendants barraged the public with news releases portraying only Homex's "successes", while the defendants consistently withheld the adverse information material to any balanced appraisal of the company's prospects.

A. The Formation of Homex And The First Public Offering

On August 1, 1968, in the village of Avon, New York, near Rochester, David and William Stirling, with Yanowitch acting as attorney, formed Homex from several construction and land holding companies that they controlled for the proclaimed purpose of building apartments with "the assembly-line production techniques of the automotive industry". (GX 166 at 51940). Shortly thereafter, Homex erected its first modular apartments in 32 round-the-clock hours under the lights of both its construction and movie crews. The resulting film was the first of many in an extensive public relations program directed at "investors, shareholders, bankers, investment bankers", which put Homex's "best foot forward". (GX 799 at 50108; Tr. 4103). The financial press also received the first flurry of what became a blizzard of "news releases" with stories of Homex's successes. (GX 166 at 51924-39; Tr. 4094-106). William Stirling, and to a

lesser extent, David Stirling, personally reviewed and approved each and every one of these films and other communications with the financial media and the investment community. (Tr. 4103; GX 166, *passim*; see also Tr. 2799, 2770-71, 2776, 4099-4102).

1. Labor Relations

After Homex settled its labor relations at both the Avon facility and its remote construction sites, the press releases began describing Homex's "precedent-setting" relations with the United Brotherhood of Carpenters and Joiners of America ("UBCJA"). (*E.g.*, GX 166 at 51,889-92). Homex claimed to have overcome organized labor's opposition to modular housing, which was based upon the fear that the assembly-line would eliminate jobs and that the bulk of what remained would be at a distant production facility. (Tr. 639). In fact, Homex had entered into a cosy relationship with the UBCJA.

Through Homex director Theodore Kheel, David Stirling invited the UBCJA to organize the Avon plant, and, accordingly, Samuel Ruggiano, the UBCJA's regional representative, was directed by its president, M. H. Hutcheson, to meet with David Stirling on the plan to set up a separate local union for Homex's employees. (GX 734 at 9/10/68). Instead of following his normal practice of petitioning the NLRB for an election between the UBCJA and the UAW, an uninvited competitor, Ruggiano simply requested that Homex bargain collectively with the UBCJA. Homex, just as promptly, stipulated to the UBCJA's certification and recognized the union as the exclusive representative of Homex's production employees. (Tr. 598-99; GX 734 at 9/21/68). Under this September, 1968 agreement a grievance committee was to be established to process grievances, but without the "authority

to bind" which was explicitly left with Ruggiano or other UBCJA "General Representative". (GX 3 at 13a at 1-2, 10-11, 16).

In late November 1968, David Stirling told Ruggiano that the Akron, Ohio chief building inspector, who favored a Homex project there, had advised that numerous union objections to the erection of modular homes had been raised with the Akron Planning Commission Appeals Board, and that Homex needed "as much union backing as possible". (GX 734 at 12/7/68). Thereafter, Ruggiano was assigned by the UBCJA international to travel to Akron where he and other local Ohio UBCJA officials appeared before the zoning board on Homex's behalf. As he reported to UBCJA president Hutcheson:

"The Business Representatives of the Akron D. C. under the leadership of Brother Elmer Jacobs did a terrific job. We were able to convince the Appeals Board. They approved the homes." (GX 734 at 12/7/68).

Jacobs, who had met with David Stirling in this connection, also appeared before the Akron City Council to support the zoning request. (Tr. 645-46). In addition, Milan Marsh, the Ohio State Council of Carpenters executive secretary-treasurer, and William Konyha, international representative then working in Ohio on assignment from the UBCJA president, both admitted to having known about the original Homex efforts in the Akron area. (Tr. 620-21, 662-64).

Although Jacobs, Konyha, and Marsh denied any discussions with David or William Stirling concerning obtaining any shares of Homex common stock (Tr. 642-43, 660-61 and 684-85), all three agreed that they had had a conversation about Homex stock with Jack Saferstein, the head of the Akron Metropolitan Housing

Authority who had died several years before the trial. (Tr. 621-29, 650-53, 665-67). Marsh recalled that some unidentified person had told them to go to Saferstein, and that he had a conversation about the "possibility of us getting a certain amount of stocks or getting on a list to be able to purchase certain amount of stocks". (Tr. 628). Jacobs recalled the meeting, but no details, and Konyha recalled simply having been told that they could "purchase some stock at \$6.00 a share" and their agreement to obtain a total of 1,000 shares. (Tr. 650-51, 667).

Similarly, Richard E. Livingston, the general secretary of the UBCJA in Washington, D.C., recalled that he was originally offered "shares of Stirling Homex stock . . . around \$12 a share." (Tr. 532-33). He testified that Ruggiano had approached him with this investment prospect in early 1970, but all discussions throughout 1969 and 1970 with the underwriters were at price levels exceeding Livingston's "\$12 a share." (Tr. 531-32). Ruggiano, while never actually dating this conversation, placed it at a testimonial dinner during which Patrick J. Campbell, a member of the UBCJA international board, also agreed to take the Homex stock. (Tr. 583-84). According to Ruggiano's recollection, Frank Csapo, Homex's manufacturing vice-president, had originally raised the subject by advising Ruggiano that "the stock was coming out and that everybody was taking advantage of it." (Tr. 580). Ruggiano then recalled attending a meeting with both David and William Stirling during which they both said that the Homex underwriting "was going to be a good thing and go up and stuff like that and [that] I ought to buy in." (Tr. 581). Ruggiano also recalled that the Stirlings assured him that Yanowitch had checked it out and that everything was "perfectly legal". (Tr. 582).

2. The profits for fiscal 1969 are fraudulently boosted by 18%.

By late 1968, the Stirlings' efforts to select an underwriter had focused upon R. W. Pressprich & Co. (Tr. 288-89). Its president, Kenneth Langone, had met with both of them and with Yanowitch in an effort to agree upon satisfactory terms.

By the close of the first half on January 31, 1969 Homex had earned approximately \$290,000 and \$100,000 in profits, respectively, on total module and land sales of \$4.7 million; 8% of which came from the sale of modules to unaffiliated parties. (GX 13 at 42,627; GX 356 at 200,197; GX 798 at 50,140). Despite this, the Stirlings projected year-end earnings of \$1 million net after taxes, and on this basis Pressprich offered to underwrite the public sale at \$15 per share of 666,666 Homex common shares. (GX 798 at 50,145-157). One-half of this block was for Homex's account while the remainder was to be made up from the holdings of the Stirling brothers and several others to whom they had issued stock. (GX 798 at 50,153; Tr. 3997).

At the end of the third quarter, April 30, 1969, only an additional \$900,000 in total sales had taken place, all for the account of the Akron Metropolitan Housing Authority. (GX 356 at 200,197). In light of the fact that Homex's private transactions were drying up while the public customer purchases were just beginning it was apparent that year-end profits would fall considerably short of the \$1,000,000 required for the underwriting. Two fraudulent "sales" of land that boosted total sales to the required amount were therefore undertaken.

(a) The first "sale" to Kece was in reality an option.

In early May 1969, David Stirling offered to Peter Thun, the general partner in a project called Hollyrood Park in which the Stirlings were limited partners, two parcels of land adjacent to Hollyrood Park which Homex then owned through its land holding subsidiary, Hollyrood Park II, Inc. (Tr. 3092, 3091). Thun rejected the commercially zoned front parcel and told Stirling that he was not interested in the side parcel unless 330 Homex modular high-rise apartments could be constructed on it at a package price for land and modules "which worked economically". (Tr. 3094). Stirling was unable to give a price for the units; consequently, Thun said that the purchase price of \$325,000 for the land alone would have to be on a basis "whereby it had more the characteristics of an option on the land". (Tr. 3094, 3155-56). The option structure was to have a low down payment with the balance being owed by a shell corporation so that if the Homex price for the 330 modules was too high, Thun could let the option lapse by causing the corporate purchaser to cease making payments. (Tr. 3094-95). David Stirling accepted these terms, although the Hollyrood Park II, Inc. minutes, signed by William Stirling as secretary, describe David Stirling's report on this transaction as a straight sale for \$325,000 with a ten percent down payment and a purchase money mortgage requiring interest payments and a \$10,000 annual principal reduction over the first 5 years. (GX 93D at 653-54). No mention was made, or at least none was recorded upon the auditors' copy of these minutes, of any relationship between that \$325,000 price and the promise to erect 330 high-rise modules at an undetermined price which "worked economically," or of the option structure of the agreement.

On June 3, 1969, the transaction was closed by the recordation of the deed, signed by Yanowitch as vice-president, from Hollyrood Park II, Inc. to Kece Associates, Ltd. ("Kece") and by the Kece to Hollyrood purchase money mortgage. (GX 73 at 98861, GX 72; Tr. 3097-98). On June 4, 1969, Yanowitch dictated a letter for Kece's acceptance outlining the 330 unit high-rise project to be built at Homex's future published prices. (GX 78-9; Tr. 3099, 3153-54). On June 11, 1969, Thun caused Kece to transfer the land to Riverbend Estates, Inc. ("Riverbend") which had been formed for the purpose of holding title. Finally, Thun reported to all of the other limited partners in Hollyrood Park Associates, except the Stirlings, that as its general partner he was holding the project at his own risk until the 330 units were produced at which point, upon request, he would transfer the whole package to the partnership "at cost". (Tr. 3100).

(b) The second "sale" to Reseac Realty, Inc. was in reality an option.

During June 1969, Yanowitch offered the commercially zoned front parcel that Thun had declined to some of his former clients at \$425,000, which included a lot previously optioned to Gulf Oil at a \$100,000 exercise price. Yanowitch explained that if Gulf exercised, the buyers' \$80,000 downpayment would be recouped and they would have the land zoned for a shopping center at no cost save the purchase money mortgage, which would cover the unpaid balance. Two of Yanowitch's prospects, Cesare Falcone and Donald J. Barbato, were reluctant. Yanowitch told them "that if something went awry along the line, that they would see to it that either they take it back or they'd find a purchaser." (Tr. 855, 887-88). David Stirling joined the trio and, after Yano-

witch repeated the "take it back or find a purchaser" assurances, Stirling concurred with both promises and went further in substance guaranteeing the buyers against "losing any money" on the transaction. (Tr. 856-57, 888).

In July 1969, prior to closing, the purchasers' attorney, Gerald Beckerman, discovered a county ordinance prohibiting the sale of beverages within 1000' of any factory, which limited the kinds of shopping centers which might be developed on the parcel to those without restaurants, grocery or liquor stores. Thereupon the third principal, Dr. Morris J. Shapiro, telephoned Yanowitch and expressed his dismay at not having previously learned of this serious restriction on the parcel. Yanowitch stated that through the Stirlings' influence the restriction could be removed and "that if we weren't able to build the shopping center . . . he would find a buyer for us and we'd lose no money on the venture". (Tr. 767). Accordingly, Beckerman prepared an indemnity agreement covering the possibility that the restriction could not be removed which he submitted to Yanowitch's former law partner, John Garrity, who was then representing Homex as outside counsel on the matter. On July 10, 1969, he was informed by either Yanowitch or Garrity that Homex would not enter into such an agreement because it was "going public." (Tr. 926; GX 342 at 79744). Beckerman's clients elected to proceed on the basis of the oral guarantees made by Yanowitch, ratified and extended by David Stirling, and the further promises that they would be "getting some stock in Stirling when it went public". (Tr. 932-34, 770; GX 342 at 79744-8, 79755).

On August 18, 1969, the transaction was closed by the recordation of two deeds, dated June 30, 1969, to the purchasers' shell corporation, Reseac Realty Inc. ("Reseac"), signed by Yanowitch as vice-president of Hollyrood Park II, Inc., and Elmsite Homes, Inc., another

Homex land holding subsidiary. (GX 347-48). In exchange, Reseac granted a purchase money mortgage for \$302,000 (the difference between \$425,000, the \$80,000 downpayment, and two first mortgages aggregating \$43,000) which require no principal payments for the first three years. (GX 46 at 98,928).

On August 27, 1969, Harris, Kerr, Forster & Company ("HKF"), Homex's auditors, certified the consolidated financial statements for the fiscal year ending July 31, 1969. During this audit, Schulz had instructed his staff not to answer any auditor's questions that related to sales. All such inquiries were to be personally referred to him. The auditors' questions concerning the Reseac transaction were channeled through Schulz to Yanowitch who provided the answers directly to Edward J. McGinty of HKF in Schulz' absence. (Tr. 2442-43). Yanowitch told McGinty (1) that there were no common shareholders between Homex and Reseac; (2) that he personally knew, without getting a financial statement, that Reseac would "be able to honor the terms of the mortgage;" and (3) that the land "could be easily resold to satisfy the mortgage". (Tr. 3211-14; GX 93E at 675). Yanowitch failed to disclose (1) the promises to provide Falcone, Barbato and Shapiro with Homex common stock at the public offering, (2) his or David Stirling's commitments that, if the zoning restriction was not removed, the buyers would not have to honor the terms of the mortgage, or (3) in light of the history of Thun's declination and the subsequent guarantees against losses that the land simply could not be easily resold to satisfy the mortgage. HKF certified the inclusion in the financial statement of the receivables from these "sales." The total Homex profit on these deals before taxes was \$425,956 which was just enough to raise the net income after taxes for the year-ended July 31, 1969, to \$1,038,268. (GX 6 at 5, GX 1 at 5).

3. The first public offering and its aftermath.

On October 1, 1969, Homex filed a registration statement with the SEC that had been signed by David and William Stirling, Yanowitch and Schulz. (GX 1 at 42,509; GX 2 at 42,517-8). With regard to the Kece and Reseac transactions, the "Sales and Backlog" section constituted the only disclosure beyond the balance sheet footnote descriptions of the terms of the contingent liability to the first mortgagors on these parcels:

"Two sales of undeveloped land acquired at the time of organization of the Company accounted for approximately 18% of the Company's net income during its first fiscal year. The larger parcel was purchased by a developer who subsequently entered into an agreement with the Company to purchase modular housing for installation on such land." (GX 1 at 42,485).

The next section of the registration statement described Homex's labor relations. (GX 1 at 42,485-6). Both of the Homex-UBCJA contracts were summarized in the prospectus (*Ibid*; GX 3, exhibits 13a, 13b). In addition, the section recited:

"As a result, the modules are manufactured and dwellings are erected completely by building trades union labor. The company has had no strikes or interference with its production or on-site erection of its dwelling units.

Freedom from work interruptions as a result of labor problems is important to the continued success of the Company's business. Although the Company believes that the above-mentioned agreements should contribute to the continuation of its present satisfactory labor relations, it can give no

assurance that the Company and its subsidiaries will be free of labor problems in the future." (GX 1 at 42,486).

Over the next four months Homex issued twelve news releases conveying such items as, for example, David Stirling's announcement of the election of a corporate officer who, in fact, had been elected six months earlier. (GX 166 at 51,864). By the end of 1969, Homex was a hot issue and it was apparent that anyone admitted to the subscription lists, if the growing demand was not met by supply or price adjustments, stood to realize a substantial gain. (Tr. 2823).

On January 6, 1970, Yanowitch asked Jerome Dienstag, an attorney with securities experience recently employed by Homex as an associate general counsel, to research whether Homex might make stock available at the offering to governmental, banking and labor union officials. (Tr. 2817-18). Dienstag's memo to Yanowitch analyzed the N. Y. Penal Law, commercial—labor bribery sections, §§ 180.00 and 180.15, assumed no intention to influence actions and still counseled against designating such individuals as "initial purchasers" at the offering because:

"... the effect on the company's public image could be seriously adverse should it be ultimately disclosed that persons with whom the company should be dealing at arms length received a substantial benefit the day the company went public". (Tr. 2822; GX 719).

Because of a perceived fiduciary obligation Dienstag counseled that, if the stock were allocated to the labor officials, "consideration be given to seeking the consent"

of their membership. (GX 719). Yanowitch and the Stirlings simply kept their dealings with the union officials secret. Ruggino was told that neither he nor his associates in the UBCJA international, Livingston and Campbell, need put up any money because Homex's bank would loan them the purchase price and hold the stock as collateral. (Tr. 584). Marsh, Jacobs and Konyha had submitted a list of their nominees to Csapo pursuant to what each claimed to recall as Saferstein's direction. (Tr. 624-29, 648-51, 664-67; GX 569). Joseph Catalano, the secretary-treasurer of UBCJA District Council in Rochester, also spoke to Csapo about being admitted to the subscription lists for the offering. (Tr. 688-89).

In approximately late January or early February 1970, Homex submitted a list of several hundred names to Pressprich as issuer-designated subscribers. (Tr. 369-70). In examining the list, Langone recognized the name of a prominent labor leader who was not associated with the UBCJA, Lane Kirkland, the AFL-CIO's secretary-treasurer. In questioning David Stirling, Langone learned about the seven labor officials directly connected to the UBCJA. (Tr. 293, 372). David Stirling was so insistent on Homex shares being directed to this group that Langone asked for an explanation. In response to David Stirling's saying that this was because "these were the people that were representatives of the labor unions," Langone told him:

"Look, I don't think this is appropriate. These are people, after all, who are effectively suppliers of the kind that is potential for conflict of interest here,' and he [David Stirling] seemed to agree with that observation, and we dropped it." (Tr. 293-4).

The SEC Division of Corporate Finance completed its letter of comment on February 5, 1970. It raised questions concerning both the land sales and Homex's labor

relations. (GX 52). As to labor, it suggested a "Special Risk" label on the cover that cross-referenced to the following paragraph at the beginning of the forepart:

"An important factor in the Company's continued success is acceptance by organized labor of the concept of assembly-line manufactured housing. The Company has entered into an agreement with the national office of the United Brotherhood of Carpenters and Joiners of America, the largest building trades union, under which the Union has agreed to furnish competent labor anywhere in the United States to erect the Company's modular housing. The Company can give no assurance, however, that the Company and its subsidiaries will be free of labor problems in the future. (GX 5 at 42554).

In addition, the Division suggested several other changes in the description of labor relations. (GX 52 at 42,438). Under Yanowitch's direction, the registration statement was amended. (But see GX 827 at 62,035). Yanowitch did not advise the SEC analyst of the underwriter's refusal to include the seven UBJCA officials connected with Homex's operations on the list of Homex-designated purchasers, or his and David Stirling's discussions and plans in that regard. (Tr. 4121-23).

On February 19, 1970, the Homex registration statement became effective for a total sale of 1,175,000 shares; 400,000 by Homex and 775,000 by the stockholders at \$16.50 per share including David and William Stirling's blocks for \$1,680,126 and \$1,700,120, respectively. (GX 5 at 42,552; GX 770-1). The issue was immediately sold at that price and, within minutes, the first shares were traded at \$34 per share. (Tr. 295).

About March 20th, David Stirling called Langone and protested that the union officials should have received

the stock, and that the matter had not been settled in their earlier discussions. (Tr. 295). Langone proposed backdating accommodation sales to the \$34 opening price on the theory that they could have bought Homex stock at market through any broker in the country even though, by the time of this discussion, the price had risen to nearly \$52. (Tr. 296-97; GX 296-301, 331). David Stirling accepted this compromise solution and instructed his banker, Charles Marshall of the Central Trust Company in Rochester, to loan the purchase price with Stirling guaranteeing repayment under his personal line of credit. (Tr. 1928-29). The bank issued its checks to Pressprich in payment for the stock (Tr. 397; GX 732) and Marshall later obtained a letter from David Stirling guaranteeing repayment of these loans. (Tr. 1931-34; GX 291). In sum, on March 20, 1970, 4700 shares were confirmed, as of February 19, 1970, to the seven UBCJA officials at \$34 per share while the market price was 52 bid and 51-3/4 asked. (GX 302, 331).

During the next four weeks the market hovered around 50; on April 23rd and 24th the market fell thirty points and the buyers were locked into a substantial loss. (GX 331).*

Throughout 1970 Schulz, as controller, received a monthly receivables report that encompassed Reseac and Kece. The report for the eleven months ending June

* According to the prospectus in use throughout the ninety day delivery period for initial registrations, Pressprich had agreed to Homex's designating 117,500 shares for sale to certain persons "promptly upon the commencement of this offering and any shares not so purchased will be reoffered to the public at the public offering price." (GX 5 at 42,553). Numerous persons received admission to these special lists, including Homex's employee members of UCBJA local 1106, but none received financing aid in the form of personal guarantees by Homex's top officers and all purchased at the public offering price. (Tr. 1743-8).

30, 1970, showed that both Reseac and Kece had uncurrent defaults from several dates throughout that period, and indeed, as to the latter, Schulz had begun to direct that duplicate Reseac statements be sent to Yanowitch. (GX 795 at 90,627, 90,629, 90,641, 90,649, 90,653, 90,656, 90,661, 90,664, 90,669-80). As to Reseac the zoning obstacle had not been removed as promised. On July 20, 1970, Beckerman, their principals' attorney, met with R. K. Davis, a Homex associate general counsel, to demand performance on the side promises which he spelled out to Davis in detail as well as telling him that Reseac had no cash and could not meet any of its obligations. (Tr. 945-46; GX 336). Davis gave Yanowitch a full report of that discussion. (Tr. 1244-47). As to Kece, its uncured default extended back many months because Thun had a "decreased expectation" that the side promise to sell and erect 330 modules would ever be honored. (Tr. 3109).

On July 17, 1970, an investment analyst with Sanders, Stiver & Co., a Cleveland, Ohio broker-dealer previously employed by the Stirlings to assist in a private placement, issued a research report on Homex and the modular housing industry that emphasized, *inter alia*, skilled labor's strangle hold in the construction industry generally. (GX 166 at 50,803-806). This praise largely echoed several Homex "news" releases. For example, one release claimed a national labor agreement with the UBCJA "guaranteeing the installation of Homex modules anywhere in the United States". (GX 166 at 51,818, GX 166 at 51,816). The UBCJA contracts expressed no such guarantee; Homex's ability to perform well with labor relating more to the extra-contractual abilities of the UBCJA officials in alleviating objections raised by local unions. Ruggiano forcefully settled disputes with the Teamsters in Worcester, Massachusetts (on terms violative of the second June 1969 Homex contract with the UBCJA) and with

the Ironworkers in Rochester and Erie, Pennsylvania. (Ex. 739 at 8/1/70, 8/15/70, 12/12/70). Akron, Ohio, was not without UBCJA strike threats directed at Homex upon occasion. (Tr. 647, 659-60). In sum, the Homex labor relations were as much the product of the powers, and willingness to employ them, of several UBCJA officials as of the original eight paragraph contract between Homex and the UBCJA.

B. Homex's 1970 Profits are Materially and Fraudulently Boosted in Order to Maintain Profitability Trends.

In the late spring and early summer of 1970, Schulz met with David Christman, an assistant controller in Homex's installation division, whose duties included calculating the revenues and expenses to be reported by that division. Christman had just brought the calculations current and had uncovered a half-million dollar shortfall in the year-end profits previously projected for that division. Schulz' reaction was to instruct Christman to "delay recordation of the accounting entry embodying that calculation" until after the close of the fiscal year. (Tr. 2607).

Next, during August and September, 1970, Schulz participated in a series of meetings with HKF concerning its certification of the figures for the year-ended July 31, 1970, and several other issues that had arisen during the audit. One of these issues related to Homex's sales contracts and a change that had occurred during the year from a format that transferred to the seller both title and risk of loss when the module was delivered to a carrier to a turn-key format that retained title and risk of loss in Homex until construction was actually completed and a closing had occurred. (Tr. 2608-09). Under the original format, Homex had recorded income from the sale

of modules when the units were transferred to independent carriers. (GX 5 at 42588). Under the new format, HKF was being asked to certify the 1970 results on the basis of sales being recorded when the modules were "manufactured and assigned to specific contracts". (GX 14 at 23, fn. 3). During the year the company had also changed its method of recording income on the installation portion of its sales contract from the completed contract method to the percentage of completion method. (GX 14, at 23, fn. 3).

To support this method of recognizing revenues, the company retained Joseph A. Mauriello, a Professor of Accounting at the Graduate School of Business Administration of New York University, to write an opinion for submission to HKF. (Tr. 3567-70). Schulz supplied all of the representations on which Mauriello's opinion was based, including the statement that Homex's profits in the installation phase had exceeded industry averages. (Tr. 3571-73; GX 843 at 5898 and 5901). What Schulz did not disclose to either Mauriello or HKF was the conceded material \$500,000 delayed accounting entry which would have reduced the 1970 installation division profits by more than 60% and Homex's consolidated profits by more than 11%. (GX 12, p. 5; Tr. 2610).*

All of the more than one-half million of receivables resulting from the "sales" to Kece and Reseac were in default at July 31, 1970. HKF was provided with a letter opining that both receivables "are considered to be col-

* In addition, Schulz did not tell HKF that certain module shipment records, signed by the shipper had been altered at Schulz' personal order before he submitted them to HKF pursuant to his policy of restricting all "sales" audit communications to himself. (Tr. 3031-32, 3042-47; Compare GX 399A and 399B with GX 853 at 5807-13; Tr. 2503-4, 3217-20).

lectible by management of Stirling Homex" and providing a friendly appraiser's statement that the land values exceeded the receivables; the letter argued that collectibility was also established by a recent payment "received from Kece" and Homex's current expectation that it would soon be receiving "payment for the amount currently due from Reseac." (GX 95C; Tr. 1520-27). The letter failed to reveal Yanowitch's knowledge about Reseac and the further fact that David and William Stirling had themselves made the recent payment on Kece's behalf because Thun had refused to do so. (GX 88, 91, 92, 95E-F, 96; Tr. 770-73, 857-58, 890, 2217-23; 3118-31). On October 5, 1970, the Stirlings obtained Thun's signature on the Kece confirmation to HKF as as part of this same transaction, wherein they sold their interest in an unrelated corporation to Thun and his associates for \$95,000, which they then used to pay off several Thun-controlled Homex receivables including Kece. (GX 91, 95D; Tr. 2217-23).

C. Homex's Mounting 1971 Losses are Converted into Profits by Numerous Fraudulent Means.

1. First quarter modular sales are fraudulently boosted by 75%.

Nearly three-quarters of the modular sales recorded on Homex's books for the 1971 first quarter ending October 31, 1970, were the result of the assignment of modules to two "sales contracts" ostensibly for installation in Clay, New York and Southbridge, Massachusetts. (GX 352 at 208,339 and 208,341; GX 356 at 200,055; GX 795 at 90,580; GX 833; Tr. 2448-50). David Stirling and Schulz decided upon the inclusion of these two "sales," although neither a written contract nor a funding commitment was in existence for either, and, through Schulz, Donald Kesel, the accounting manager,

entered them in the journal on November 6, 1970. (GX 351 and 627 at 64,985-7 and 64,990; GX 1047; Tr. 3060, 4251-57, 4270-770). Thereafter, these first quarter figures were supplied to both commercial and investment bankers. (GX 593, 594 at 54,229-31, 54,250; GX 595 at 54,147; GX 685; GX 812, GX 900; Tr. 1534-35 and 5257-4273). Both David and William Stirling as well as Yanowitch attended several meetings during which these unaudited first quarter figures were discussed with investment bankers and both of the Stirlings later received and reviewed an offer to purchase Homex debentures induced by these figures. (GX 593-95).

2. Schulz creates a second, false set of books on Homex's computer.

Homex maintained a computer file which showed the various modules being assigned to those projects where they were actually to be installed. In December 1970 the creation of a second "simulation" file was ordered, with Schulz' knowledge, which recorded various modules being "assigned" to those specific contracts which would then be included in sales. (GX 785, 3058-59; Tr. 3035-36, 3057). The computer room employees promptly dubbed this the "Mickey Mouse" file in order to distinguish it from the "real world" of the original file. (Tr. 3056-64). The only use to which this file was ever put was to twice deceive Homex's auditors in certifying its fraudulent financial statements.

3. The third land "sale" to Route 57-31.

On December 16, 1970, David Stirling met with Harold L. Wynn, Jr. and William Grago, Jr., and their attorney Carmen Grasso. Wynn and Grago were both operating officers of the Empire Pipeline Corporation, a small con-

struction concern which had received from Homex upwards of forty percent of its revenues for the last several years. (Tr. 979-81, 1031-33, 1951-52). Stirling proposed that Wynn and Grago purchase approximately 133 acres of Homex land in Clay, New York, for \$2.1 million. Part of this ostensible purchase price would be paid by a state condemnation award which was expected to be substantial, perhaps as much as a million dollars. (Tr. 984, 1057). Wynn's response was that such a deal was simply out of his and Grago's financial league. (Tr. 984-85, 1034-35). David Stirling countered by dangling the prospect of sufficient additional Homex "developmental work" to Empire Pipeline, to enable them to carry the project which would require only 10% as a down payment with no principal or interest payment for five years. (Tr. 985-86). Wynn responded that he and Grago were simply unable to come up with the \$210,000 for a down payment. At this point, Stirling proposed that Homex arrange the financing for the down payment and that Wynn and Grago put up nothing. (Tr. 986). Even so, Grago requested a guarantee against any losses. Stirling explained that "there could be no corporate guarantees but he would personally guarantee that we would not be hurt" and, on this basis, the deal was struck "and we shook hands on that". (Tr. 1036).

Thereafter, David Stirling and Yanowitch asked Charles Marshall, who had recently joined Homex after retiring from the Central Trust Company, to arrange a bank loan for the Route 57-31 Development Corporation ("Route 57-31") which Grasso, Grago and Wynn had set up to take title to the property. (Tr. 1957). Marshall was empowered to deposit \$100,000 of Homex funds in a non-interest bearing account at the First National Bank of Rochester and, more directly, to cause Kabeth Properties, Inc. (the Homex land holding subsidiary owning the property), to assign the condemnation award receivable to the bank as the collateral for its loan to Route 57-31.

(GX 58; Tr. 1958-62). In return the bank loaned \$250,000 to Route 57-31 of which \$210,000 was for the down payment and \$40,000 was to be kept in an account against which interest would be debited. (GX 56-57, 59, 62-63, 65-66). As none was required under the contract, no closing occurred and no deed was tendered by Kabeth upon its receipt of the \$210,000 bank check endorsed over to it by Route 57-31. (GX 65, 128 at 79,878; Tr. 1295, 1527-29).

Next, Yanowitch and Schulz met with Mauriello to obtain his opinion supporting the immediate recognition of \$1.4 million in profits on the \$2.1 million "sale" to Route 57-31 for the benefit of the auditors. (GX 572, 581-82, 661; Tr. 1297-1300, 2574-77). They discussed the SEC's concern, as expressed in its Accounting Series Release No. 95, with just such transactions as this one, and, in particular, the applicability of several of its nine "circumstances" said to raise questions as to the "propriety" of currently recognizing income. (GX 580 at 99,101; Tr. 1300), Mauriello asked whether there was "any indirect financing" because "we did not want the buyer to obtain money through the auspices of the seller one way or another." (GX 674 at 67,173; Tr. 2576). Nothing was revealed about the First National Bank's loan to Route 57-31 or the inducements and security for it. Yanowitch also omitted any disclosure of this during his descriptions of the transaction to HKF or, its successor, Peat, Marwick, Mitchell & Co. ("PMM"). (GX 661; Tr. 1310-14, 1535-38 and 55430).

4. Homex's 1970 annual report and proxy statement.

On January 6, 1971, Yanowitch instructed the Homex chauffeur, William McCann, to cash six Homex checks, each payable to cash, totaling \$11,500 and to return

with the cash. (Tr. 199-200, 245-48; GX 320). Each of the checks had been issued on the basis of false travel and entertainment expense vouchers signed by both of the Stirling brothers, Yanowitch and other Homex employees. (Tr. 1301-12; GX 319-320). The \$11,500 was not in fact for reimbursements of expenditures, but was used to pay the interest due the Central Trust Company on the loans to the seven carpenter's union officials in connection with their fully financed "purchases" of Homex stock the previous year. (Tr. 427, 445, 448, 451-2, 464-8 and 510-12; GX 315).

On January 8, 1971, Homex's proxy statement and annual reports were mailed. (GX 800 at 50321-355). The annual report opened with the Stirling brothers' joint letter to shareholders containing the following references to Homex's labor relations:

"Stirling Homex is pleased to have been the first modular housing manufacturer to sign a national labor contract with the United Brotherhood of Carpenters and Joiners of America (AFL-CIO) for both in plant production and on-site installation." (GX 14, p. 3, see also p. 9).

The accompanying proxy statement, soliciting the election of the Stirlings and Yanowitch disclosed nothing of their activities in connection with the "purchases" of shares for the seven carpenter's union officials, the arrangement of and guarantee on the \$250,000 of bank loans, or the recent \$11,500 indebtedness incurred to pay the interest thereon. Of course, since the advance of \$11,500 was not mentioned, required shareholder approval of this at the succeeding annual meeting would not be obtained. (GX 800 at 50,323; GX 14 at 42,677, p. 2).

5. Homex's \$15,000,000 "sale" to Greater Gulf.

On January 31, 1971, Rubel L. Phillips, Fred LaRue (who was known to the jury only as "a member of the White House staff") and David Stirling met near Montreal and discussed their plans concerning the Greater Gulf Coast Housing Development Corporation ("Greater Gulf"), a Mississippi nonprofit membership corporation controlled by them. (Tr. 4345-46, 4939). Phillips, who had been a Homex lawyer since July 1970, had formed Greater Gulf pursuant to a plan to have it execute a contract for the purchase of several thousand apartments which was based upon a Homex promise to construct a Mississippi plant where the apartments would be manufactured. (GX 165 at 70,525). Phillips, Yanowitch and Stirling handpicked several Mississippians as its founding members on the basis of their interest in attracting industry to the six southernmost Mississippi counties. (GX 116-18, 165; Tr. 1786-90). In addition, Phillips promised them that no expenses would be incurred because Homex would "arrange for the financing" of any Greater Gulf administrative costs as well as for the financing of the plant through either a government grant or an industrial revenue bond offering. (GX 116 at 65, 123; GX 117; GX 126; Tr. 4338). The original plans also had called for Greater Gulf's feigning solicitations for bids from module manufacturers and ultimately awarding Homex the contract, which would be funded by the United States Department of Housing and Urban Development ("HUD"). (GX 131, 140). However, by late January, 1971, it had become apparent that HUD funding was impossible, and at the Montreal meeting the plan was modified to switch the funding to the Farmer's Home Administration of the United States Department of Agriculture ("FHA"). (GX 135; Tr. 4939).

On February 9 and 20, 1971, Phillips brought S. B. Wise and W. T. Richardson, the Mississippi FHA state

director and his assistant, respectively, to Avon to discuss with Yanowitch and David Stirling their authority to commit FHA funds to Greater Gulf for the purchase of Homex modules. (Tr. 1395-1401, 4349-51, 4940-41, 444-48). By the second meeting, it was clear that they could be of little aid because of limitations on their funding authority. (Tr. 1403, 4946; GX 116). Nearly a month had gone by since the close of the six month period ending January 31, 1971, and because Homex had no time left to obtain any official FHA commitment, forgery had to suffice.

By mid-February 1971, both of the Stirlings, Yanowitch, Schulz and Phillips were all committed to an underwriting schedule requiring the prompt filing of a registration statement with certified financials for an interim "stub" period. The Stirlings had selected Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") as Pressprich's successor. Yanowitch and Phillips had attended meetings in January 1971, with Merrill Lynch and its counsel, Brown, Wood, Fuller, Caldwell & Ivey ("Brown, Wood") concerning the offering. (GX 139; Tr. 5100-11). By early February, Brown, Wood's due diligence review was underway and the Stirling brothers were personally censoring every item of information being supplied. For example, William Stirling approved Yanowitch's proposal to allow an inspection of sales contracts on Homex's premises, but to refuse all requests for copies. (GX 806-07). In addition, Schulz and Yanowitch had been reporting to both of the Stirlings the lack of any meaningful progress over the course of several meetings to persuade HKF to ease its audit requirements for including manufactured modules in sales, not to mention its expressed skeptical reaction to the Route 57-31 "sale" transaction, and the more receptive attitude of William J. Murray, a PMM partner who Maurillo had sounded out as to both these and other items. (Tr. 2580-87, 3243-54; GX 817). Accordingly, during the last

week of February, 1971 HKF was discharged and PMM engaged as Homex's auditors.

On February 25, 1971, Schulz directed Kesel of the accounting department to enter into Homex's computerized journal the debit and credit figures for the previous month as a compound entry that simultaneously wrote off sales for seven different projects and wrote on \$6,786,900 worth of 566 modules sold to Greater Gulf. (GX 358, 795 at 90,556; Tr. 2455). On the day before, February 24, 1971, Phillips had secured the signature of Kenneth Caron, Greater Gulf's volunteer president, on a "sales" contract between Homex and Greater Gulf which was backdated to December 28, 1970, so Phillips explained to Caron, "for purposes of getting it funded." (Tr. 5093; GX 111, 111A). Caron, whose wife and friends were awaiting his return to the dinner table, signed his name at least a dozen times that day in the hotel lobby where Phillips had asked to meet with him. (Tr. 1799-1800, 5101-2, 5117). Phillips told Caron that this agreement was just like the earlier \$100 million Homex-Greater Gulf contract which Caron had actually signed in December, 1970, but was for a reduced, more realistic number of apartments. (Tr. 1803-06). There was another key difference which Phillips did not call to Caron's attention: the elimination of the clause requiring that all modules be actually manufactured in Mississippi. (Compare GX 108 at 89,040 with GX 111 at 78,092). In addition, the stack of documents also contained a letter from Greater Gulf to the FHA in which a \$15,000,000 loan was requested and a response, which Caron "accepted," committing that agency to make such a loan. (GX 112A, 112C). The FHA official's signature on that commitment letter had been forged by Phillips and his secretary as part of an agreement with "Yanow" to get some letter back up to them that was going to be placed in the files and never would be seen." (Tr. 1416).

The letter was treated with the promised secrecy in Avon. The signed original was kept by Yanowitch in his desk drawer and only taken out on four occasions. The first was to allow Schulz to telex a copy to Mauriello in order to obtain an opinion as to the propriety of recording income on the Greater Gulf transaction. Yanowitch got that copy of the letter back from Mauriello and had him erase all references to it in his draft opinion. (Tr. 2588-94; GX 112C). The second occasion was when Yanowitch and David Stirling gave a copy to Marshall to display to Homex's commercial bankers but not to duplicate. (Tr. 2059, 4355-56; GX 990 at 51,980). The third occasion was on March 19, 1971, following a PMM request to Schulz to examine the original letter, when Yanowitch displayed the original to three PMM auditors, and then deflected their request for copy by citing confidentiality and promising to provide it the following week upon completion of a news conference. (Tr. 3264-70). The final occasion was a year and a half later when, on the eve of bankruptcy, Yanowitch and the Stirlings purged the Homex executive suite of numerous documents, although the witness to this only recalls "Gulf Coast material" generally. (Tr. 2297-2306). The secrecy was maintained through the underwriter's due diligence review during which Schulz was forced to reveal Greater Gulf's existence to Dienstag, the Homex counsel, since it accounted for more than 10 per cent of sales. (GX 620; Tr. 2838-39). Schulz promptly reported to Yanowitch and the Stirling brothers:

"I mentioned the Farmers Home Administration as being the ultimate source of funds but suggested that he discuss this with you before disclosing it to any outside parties". (GX 620).

To PMM, this Greater Gulf "sale" was both verbally described by Schulz and documented by a copy of the

backdated December 28, 1970 contract, and an additional, also backdated, contract dated February 15, 1971, between Greater Gulf and U.S. Shelter Corporation ("US Shelter"), a Homex "financing" subsidiary. (Tr. 3263-64). Phillips had induced Caron to sign this letter on March 16, 1971, by promising again that the modules would be manufactured in Mississippi. (GX 113, 114A, 115; Tr. 1808-10, 4956-58, 4980-81). This promise was not transmitted to PMM and so its certificate covering these Greater Gulf "sales" was on the basis that all the modules involved had been manufactured in Avon. (Tr. 3275, 333-33, 4981; GX 710).

6. The financing aspects of the Route 57-31 "sale" are withheld.

In order to persuade PMM to include for certification in Homex revenues the entire \$2,100,000 purportedly realized from the Route 57-31 "sale," David Stirling, Yarnowitch and Schulz, through Mauriello, consulted with Mr. May as to PMM's in-house guidelines for real estate transactions, and then twice amended the original contract to remove several features thought to be objectionable. (Tr. 2580-2588; GX 394, 3953, 670; Tr. 3243-55). As a result David Stirling further guaranteed Wynn that future Homex payments would be increased to give them "enough cash flow to handle" a \$25,000 annual reduction of principal. (Tr. 996, 1041-44; GX 67-9, 384). Neither this promise, nor the collateralization of the original bank loan to Route 57-31, was ever disclosed to PMM. (Tr. 2610, 2613, 3260-63, 3326-29). Instead, David Stirling and Schulz signed the standard management representation letter negating undisclosed "assets pledged or assigned as security for liabilities", and, in a special additional paragraph, represented:

"9. That the officers and directors of the corporation had no direct or indirect relationship with Route

57 and 61 [sic.] Development Corporation to whom land was sold under a sales contract during the period." (GX 395A).

7. The masking of further deterioration in the Reseac and Kece receivables.

Both the Reseac and Kece receivables were still in default at the end of February 1971 as chronicled throughout the monthly receivable reports studied by Schulz. (GX 795 at 90, 533-34, 90,731, 90,565-69, 90,572-74). Schulz' earliest underwriting checklist noted the "past due" status of each and the need to correct them. (GX 627 at 64,991). David and William Stirling resolved the Kece situation by much the same method as employed at the previous audit: both of the Stirling brothers executed bills of sale cancelling their entire Hollyrood Associates limited partnership interests (at least 10% of \$7,000,000), and the general partner Thun, in turn, (1) caused it to pay two notes totalling \$35,000 already owed the Stirlings, (2) paid approximately \$22,000 of the Kece arrearages and (3) signed the Kece confirmation to PMM. (GX 82, 86, 70B; Tr. 3132-37, 3144). In order to avoid disclosing the imminent foreclosure threats by the first mortgagees and the uncollectibility of Homex's own purchase money mortgage, the Reseac principles transferred their stock back to Homex. (GX 100). Next, Yanowitch induced his former law partners, Frank and Garrity to take the property with the assurance that Homex would increase its legal fees so that they could carry and ultimately pay off the purchase loan. (Tr. 1104-05). Yanowitch performed by increasing at least eightfold to \$8,000 per month and then \$16,000 during 1971 and 1972 the "legal fees" paid for such services as nightly readings of magazine articles about housing. (Tr. 1116 (*as corrected*), 1205-07; GX 97).

8. The \$832,000 capitalization effort

The Stirlings, Schulz, Yanowitch and Phillips cooperated in the effort to reduce both deferred and general expenses by \$832,000, carrying it instead as a receivable, on the theory that such a sum arguably related to building the Mississippi plant and that local Mississippi government authorities would reimburse the company. (GX 808 at 95,721; GX 809 at 90,946; GX 817 at 90,398; GX 398). Phillips' role was to obtain a clean confirmation from the Mississippi bank designated as trustee of the proceeds of the industrial revenue bond offering. (GX 992; Tr. 4969; GX 867). As Schulz had written in his memorandum report to Yanowitch and the Stirlings, Brown Wood would find out about the \$832,000 only if PMM "finds it necessary to footnote this item." GX 815 at 95,201; GX 630 at 64,427). PMM did initially reveal the sum in the "Other Receivables" sub-account (GX 802 at 105,110) so the decision was made to switch the \$832,000 to the construction-in-progress sub-account of the property, plant and equipment entry on the balance sheet, despite the David Stirling-Schulz representation in the audit letter that they knew of no "contingent assets", where its diminished materiality would insure that it would go unnoticed. (See GX 802 at 105,110-11, 105, 122; GX 867; GX 395 at 20,118; Tr. 3293, 3532-33).

9. Homex's registration statements are falsified in numerous material respects.

The Homex registration statement was initially filed on April 21, 1971, covering the sale of 1,025,000 shares of common stock, but was soon converted, by an amendment on May 28, 1971, to a new issue of 500,000 shares of cumulative convertible preferred. (GX 8, 10). The SEC's letter of comment, issued June 30, 1971, provoked

a conference on July 7, 1971, an amendment on July 16, 1971, and a final amendment on July 29, 1971.* (GX 11-12, 34, 397).

As originally filed, the first two paragraphs of the "Labor Relations" section repeated verbatim the descriptions of the two Homex-UBCJA contracts in the original registration statement, the only difference being an increase in the number of Homex employees reported. (Compare GX 1 at 42,485-86 with GX 8 at 9-10). The next paragraph was originally filed with a caveat:

"The Company believes that the above-mentioned agreements have contributed to its present satisfactory labor relations, but it can give no assurance that it will be free of labor problems in the future." (GX 8 at 10)

This was deleted in the effective registration statement:

"The Company believes that the above-mentioned agreements have contributed to its present satisfactory labor relations." (GX 12 at 12).

Nothing else would ever be revealed concerning Homex's "present satisfactory labor relations" including another \$10,864.76 in advances, beyond the \$11,500 on January 6, 1971, which had occurred via the false travel and entertainment expense voucher method in order to pay the accruing interest in the labor officials loans.** The

* Homex's earlier, 1970 registration statement was also twice amended, initially on July 16, 1971 and then by the final effectiveness amendment of August 23, 1971, both times by wrapping a cover around the July 29, 1971 prospectus (GX 6-7).

** As filed on April 21, 1971, David Stirling's advances from Homex were said to have totaled, \$297,563, during 1970 and 1971, and by the May 28, 1971 first amendment, that sum had increased to \$306,760. In both filings, it was claimed that all

[Footnote continued on following page]

short-term continuation of this state of satisfactoriness at the Avon production facility by the UCBJA local 1106 having a contract there seemed to present little difficulty according to the July 16, 1971 amendment, which stated:

"The Company anticipates that negotiations relating to a new collective bargaining agreement will commence in the near future. While it does not expect any difficulty in negotiating such contract, it can give no assurance in this connection." (GX 12 at 12).

However, the long-term continuation of the state of satisfactoriness of Homex's labor relations at Avon, and perhaps most importantly at the distant job sites, had to be assessed wholly without any disclosure beyond the claimed contribution of the contracts to that end.

As originally filed on April 21, 1971, the three land "sales" to Reseac, Kece and Route 57-31 had been described in the "sales" section as follows:

"During the fiscal year ended July 31, 1969, the Company sold two parcels of undeveloped land and during the seven months ended February 28, 1971

such advances had been used "for the purchase of building materials for the use of David Stirling Jr., all of which has been repaid by Mr. Stirling." (GX 8 at 15, GX 10 at 16). This disclosure led to the SEC's inquiry whether, if the advances were in fact interest free, that fact should not be disclosed together with any present intentions to make similar future advances. (GX 397 at 6). In response, Yanowitch caused to be inserted by the two July 16, 1971, amendments to the 1970 common stock registration statement ("Post-Effective Amendment No. 1") and the 1971 preferred offering ("Amendment No. 2"), a disclosure of the interest-free character and that Homex would not be making any further loans to officers unless "such loans would be in the best interest of the Company". (GX 6 at 18., GX 11 at 18).

it sold one parcel. Trade sales included \$750,000 for the year ended July 31, 1969 and \$1,822,723 for the seven months ended February 28, 1971 in respect of these sales, which resulted in net income for the respective periods of about \$187,000 (18% of the total net income) and \$556,000 (35% of the total net income). All the sales of undeveloped land provided for deferred payment of part of the purchase price. See Note 4 of Notes to Consolidated Financial Statements. The Company does not anticipate that land sales will be a significant part of its business in the future." (GX 8 at 7).

With the addition of the nine months ended April 30, 1971, in the May 28, 1971 amendment number one, the only change to this paragraph was to reduce the Route 57-31 percentage to "23% of the total net income" for the nine months. (GX 10 at 8). The referenced footnote detailed the terms and amounts of the three receivables, and in the case of Route 57-31 only, stated that it was "a corporation whose principal asset is its interest in the contract". (GX 8 at 27-8; GX 10 at 30-1). This footnote disclosure had been forced by HKF's threats to Yanowitch and Schulz to disclose it themselves if Homex refused. (GX 763; Tr. 2875-78, 3281). In light of the initial disclosure the SEC's letter of comment only solicited, beyond requiring extraordinary item treatment of the three transactions in the summary of earnings, further disclosure of the Route 57-31 facts. (GX 34 at 42,454 and 457; GX 397 at 4 (Item # 16) and 7 (Item # 24)). The response, prepared by Schulz and Yanowitch, in collaboration with PMM, was false in countless respects including the explicit negation of any "[c]oncurrent loans" to the "non-affiliated" purchaser; Route 57-31 was said to have made "substantial cash payments to the Company which far exceed payments usually made in

connection with options to acquire land." (Tr. 2892-98, 3296-3304; GX 55A at 1, 4 and 10 of land sales memo). The SEC refused to permit the inclusion of the \$2,100,000 in the sales reported in the registration statement for the seven and nine months periods; the Route 57-31 "sale" was removed by the July 16, 1971 amendment which left Kece and Reseac intact. (Tr. 3307-08; GX 11 at 5 and 34 fn. 5(b)).

The Homex registration statement claimed that its accounting system recognized income on modular sales "when units are manufactured and assigned to specific contracts." (GX 8 at 7; GX 2 at 6 fn (A) and 8) Because the SEC's letter of comment had inquired whether income was recognized "too far in advance of the date of billing to customers," Schulz and Yanowitch, in consultation with PMM, prepared a script to reply to the SEC both orally and in writing. (Tr. 3301-08; GX 397 at Reply Item # 35; GX 55A). Numerous aspects of Homex's accounting practices were falsely described, including the claims that Homex possessed a *bona fide* contract and government funding commitment for each sale before recognition: "When all these events have occurred, and only when all these events have occurred, does the Company recognize income." (GX 55A at 7; GX 397 at Reply Item #35, p. 3). Passing the forged Greater Gulf FHA letter, and the backdating of that contract, numerous sales had in fact been recorded on the journals before satisfaction of either condition. For example, the Stirling brothers, Yanowitch and Schulz all knew that three-quarters of the sales for the quarter ending October 31, 1970, had been for the Southbridge and Clay jobs (GX 795 at 10,735; GX 356 at 200,055; GX 594 at 54,231; GX 595 *passim*; GX 627 at 64,986-7; GX 859 at 49,204-5), and that financial statements reflecting these sales had been given to commercial and investment bankers and, through the latter, to investors. Because Schulz' destruction of the back-up

details attached to these journal entries had effectively hidden from any prying auditor's eyes the later reversals of these and several other sales in favor of Greater Gulf, PMM had been willing to be associated with the further statement to the SEC that a third condition was that all sold modules were "assigned to and reserved exclusively for" the customer. (GX 352; Tr. 2452-3; GX 55a at 6). As pointed out by Murray of that firm, the incidence of large-scale reassignments made that representation false because such reassignments:

"... would be a firm indication to me that Stirling Homex was not producing to a specific customer order and exclusively reserving modules for contracts, but rather manufacturing for inventory and therefore instead of having those units in sales, those units would have been in inventory, which would have had a significant effect on the income recognition and the portrayal of the balance sheet" (Tr. 3336).

This key omission had the effect, first, of persuading PMM to lend its authoritative support to Homex's accounting practice and, second, of persuading the SEC to permit the Homex registration statement to become effective without further disclosure of this important history of the described accounting practices.*

* The SEC's letter of comment specifically asked, with respect to the U.S. Shelter "Finance income" claimed to have been earned in the seven months ended February 28, 1971, for identification of the source of that fee. (GX 34 at 9, GX 397 at 9, Item 39). The facts concerning Homex's formation of Greater Gulf, its shell character and its only actions having been the signing of six contractual documents with Homex and US Shelter and related audit confirmations, were withheld; for good measure, Greater Gulf was characterized in the prospectus as "a non-affiliated customer". (GX 11 at 32 fn. (c)).

As filed and as effective, the summary of earnings repeated the 1970 profit overstatement resulting from the delayed recorda-

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10. Upon effectiveness, Homex distributes \$20,000,000 of preferred stock.

On July 29, 1971, Merrill Lynch sold and distributed the 500,000 shares of Homex preferred stock at \$40 per share which netted Homex \$19,000,000. (GX 22). Over the next few months, each of the Stirling brothers sold upwards of \$500,000 from their respective common stock holdings. (Tr. 4032-04).

11. The issuance of the 1971 annual report.

On September 15, 1971, before PMM could complete its audit of the balance sheet tax entries and because of the Stirlings' rush to publicize, the Dow Jones wire reported Homex's year-end revenues of \$36,847,728. (GX 166 at 51,709; GX 697; Tr. 2770-1). The Greater Gulf "sale" contributed \$8,520,400 toward that total, with the latest journal entry of August 1, 1971, recording 60

tion of the \$500,000 cost overrun. Similarly, the 1971 profits were overstated by the deliberate understatement of 1971 expenses by \$832,000, which had been transferred out of expenses and capitalized in the "construction in progress" sub-account of property, plant and equipment on the theory that these were soft-costs of the planned Mississippi plant. (GX 8 at 28 fn 6). More than half (\$452,000) of that sum had been accumulating in the property acquisition sub-account of deferred expenses; the remainder, since it was all "executive level salaries", being in general and administrative expenses. (GX 398 at 106, 184-5). Because the SEC's letter of comment had noted that "the increased capital charges", even without the \$452,000, were "roughly 67% of reported net [income]" and requested factual discussion of the magnitude of this increase, the July 16, 1971 amendment added that deferred charge increases were for all kinds of projects other than the Mississippi plant. (GX 12 at 6, 37fn. 7). The net effect of having to expense the whole \$832,000 during the seven months ended February 28, 1971, would have been nearly to halve gross profits from \$2,021,600 to \$1,189,600.

more modules assigned to this project—still without ever having obtained either a valid contract or genuine governmental funding commitment. (GX 361; 363 at 200,431; 364B at 43,946). In addition, \$2,720,000 of this had been contributed by two “sales” to a Virgin Islands customer despite its telegram to William Stirling (copies to Schulz and Yanowitch) on August 26, 1971, canceling those contracts. (GX 573; GX 360; GX 356 at 200,010; GX 363 at 200,431). Much like the year before, the accounting entry embodying this cancellation was postponed into the next reporting period. (GX 1069; GX 71C; Tr. 5134-41). David Stirling and Schulz again signed a PMM audit representation letter reaffirming the same representations falsely made in March and, because of further non-payments by Kece and Reseac, represented that they knew of no “circumstances which would affect the collectibility” of either receivable. (GX 356A at 21,508). With Homex’s year-end financial image thus improved, William Stirling directed his attention to releasing a series of press announcements, together with the annual report to shareholders, over the next two or three months while he and his brother sold off their own stock holdings. (GC 689; Tr. 4032-04).*

* For example, William Stirling withheld his approval of the issuance of the press release announcing the UBCJA first international pension fund and the appointment of David Stirling as its management trustee for some seven weeks until after the general earnings release. (Compare GX 689 at 59,510 with GX 166 at 51,729 and 51,947-8). He personally edited and supervised the preparation of the annual report, which was mailed on October 8, 1971, together with the proposed proxy and solicitation statement. (GX 800 at 50,495-528; GX 689 *passim*; Tr. 2771-80). That latter statement repeated the registration statement misrepresentation as to the advances to David Stirling used to pay the interest on the Central Trust Company labor official loans: “During the last fiscal year the Company purchased building materials for David Stirling, Jr. in the aggregate amount of \$306,760, payment for which has been made by Mr. Stirling.” (GX 16 at 42,681). Additionally, since the two Stirling brothers

[Footnote continued on following page]

The annual report, including the Stirling brothers' message to the shareholders, mentioned the UBCJA only briefly in connection with Homex's "cooperation" with the UBCJA in training its employees. (GX 16, GX 800 at 50,512). Meanwhile, on November 11, 1971, William and David Stirling, the latter by Yanowitch as his attorney in fact, promised to indemnify William A. Shea of Shea Gould for his having purchased from the UBCJA officials, Campbell and Livingston, their 700 shares of Homex common stock at \$34 per share. (GX 295). The public bid and asked prices that day, and through the end of the month, fluctuated between \$15.00 and \$18.00 per share. (GX 331 at 48,894). On November 18, 1971, David and William Stirling further agreed to hold Shea harmless in return for his purchasing the labor leaders stock at \$34 a share and being substituted on the \$200,621 Central Trust Company indebtedness originally incurred to purchase the stock. (GX 290; Tr. 4189).

Within a month, Homex's form 10Q, for the first quarter of 1972 was filed with the SEC. (GX 24). Much of the same information in the form of a letter signed by both Stirlings was mailed directly to the shareholders. (GX 404). Neither disclosed the Shea transaction.* With regard to Homex's financial results, neither disclosed that the reported revenues for the quarter included \$945,000 in further Greater Gulf "sales", partially offsetting the

and Yanowitch had been warned by Dienstag that "drawing well in excess of their contract figures" required that something be done, the trio voted themselves new employment agreement "as of March 1, 1971" to include their excessive draws. (GX 856, GX 800 at 500,491).

* The shareholder's letter had reported only the Homex-UBCJA local 1106 contract: "The Company's union contract expired September 30, 1971, and union negotiations were successfully completed in a new three year contract for the Avon facilities". (GX 404 at 40,139).

undisclosed Virgin Islands post-period write-offs, nor that the same thing had occurred a year earlier in connection with the Greater Gulf substitution for the Southbridge and Clay sales which constituted the bulk of the 1970 figures then filed with the SEC and mailed to the shareholders for comparative purposes. (GX 24, GX 356 at 200,003, GX 363 at 200,438, GX 404 at 40,139). Similarly, during the second quarter ending January 31, 1972, an additional \$990,000 in Greater Gulf "sales" were recognized upon the assignment to that project of 110 dwelling units manufactured in New York. (GX 363 at 200, 442). The only funding commitment to support any of these sales was the forged FHA letter which itself "had conditions attached to it", the non-fulfillment of which was by this time occasioning criticism of the continued recognition of income thereon by those ignorant of its forged character. (GX 612; Tr. 2903-5).

D. During 1972, Homex Plunges into Bankruptcy While Defendants Falsify the Facts Concerning Homex's Affairs.

On February 25, 1972, the refusal of a Homex financial officer and former banker, Kuveke, to accede to David Stirling's and Yanowitch's requests to certify falsely to Homex's bankers the existence of funding commitments for two other jobs triggered the reporting of a Homex loss for the first time. (Tr. 1546-52). This led, in quick succession, to another larger loss for the next quarter, the replacement of William Stirling, who became Vice-Chairman, as president by Kuveke, the resignations of Phillips, Schulz, Yanowitch and the Stirlings and, finally, on July 12, 1972, Homex's bankruptcy.

In anticipation of the entry of the trustee in bankruptcy and their own ouster, both of the Stirlings and

Yanowitch spent the better part of their final Saturday purging the files in the executive offices of a dozen or more file drawers of Homex's records by removal to Yanowitch's basement. (Tr. 2297-2302).

During September 1972, the Stirlings, Schulz, Phillips and Yanowitch repeatedly conferred with one another on the SEC and bankruptcy trustee investigations. (*E.g.*, Tr. 5093-4, 5119-21, 5172-75, 4610-14, 5165-8, 5200-1). At one such meeting attended by all except Phillips, William McCann, the Homex chauffeur, delivered a box of Homex check skirts which represented the only record of the numerous cash deliveries which he had made to Yanowitch. (Tr. 211-12, 4332-33). This included those which had been used to generate the \$22,276 employed to pay the interest on the Central Trust loans for the UBCJA stock purchases. Neither these nor any but a handful of the numerous files taken to Yanowitch's basement would ever be produced in response to SEC or trial subpoenas requiring such production. (GX 306, 320-23A, 382, 869-872, 880; Tr. 193-220, 2302-06, 4679). Indeed, David Stirling paid McCann \$300 to take William Stirling's wife's car out of the jurisdiction because, as he told McCann: "They might subpoena you, Bill". (Tr. 217). Thereafter, at the bankruptcy hearings, Schulz, Yanowitch, David and William Stirling all testified falsely: Yanowitch denied ever possessing the forged FHA commitment letter or any other Mississippi files; David Stirling denied virtually any recollection of the Route 57-31 transaction on the false basis that some other Homex employee had negotiated it and both Schulz and William Stirling minimized the history of reassigning modules and, in the former's case, added a false claim of disclosure of that history to PMM. (Tr. 3270-72, 3381-2, 4314-3, 4670-1; GX 379-82). Later, Yanowitch repeated the same false claims in his SEC testimony. (Tr. 3272-4; GX 382). Finally, both Yanowitch and Phillips directly

solicited SEC witnesses to destroy records or otherwise give perjured testimony during the investigation. (Tr. 1917-21; 2307).

The Defendants' Cases

1. David Stirling

David Stirling testified in his own behalf. He admitted negotiating the Kece sale with Thun generally, but specifically denied that Thun had agreed to the purchase for \$325,000 if later improved with 330 Homex high-rise apartments. (Tr. 4200-01). He denied that the Homex letter to Thun the day after the closing promising 330 Homex high rises had anything whatsoever to do with the transaction. (Tr. 4203-8). With respect to the original Reseac "sale", he denied attending the meeting with Barbato, Falcone and Yanowitch, denied listening to Yanowitch's representations or adding his own guarantee that they would not be "losing any money" (Tr. 888). He admitted that in September 1970 the share certificate representing his and his brother's one-quarter interest in a \$2,000,000 mobile home park had been delivered on his instructions by his employee Bartz in exchange for approximately \$90,000 and Thun's signature on audit confirmations, although he claimed that the exchanges were entirely unrelated because he and his brother had simply agreed to "give the stock up". (Tr. 4217). He claimed that the attorney's original notes of the escrow instructions reciting that the stock was being delivered for "the purpose of inducing" the payment of Thun-related debts including Kece were erroneous. (Tr. 4222).

Regarding Route 57-31, David Stirling on direct, denied generally, on behalf of himself and his brother, any and all negotiations with Wynn or Grago, claiming as he had in the bankruptcy proceedings that

another employee had negotiated with them. (Tr. 4080-6). On cross, he admitted attending the December 16, 1970, meeting with Grago and Wynn, denied Wynn's having said that the \$2.1 million price was out of their financial league, denied further his having promised to facilitate their making the \$210,000 downpayment by arranging for the lender to advance it, and denied specifically his promising to throw sufficient business to their firm to protect them against any losses. (Tr. 4292-96). With respect to the PMM representation letter, he admitted having signed it knowing that there had been an assignment of the condemnation award to secure the lender advancing the downpayment—an assertedly well known fact in the deal from the outset, but which he, nevertheless, had denied during the bankruptcy hearings. (Tr. 4298, 4303-04, 4331). Finally, he claimed that he was unable to identify William Stirling's initials on the payment request employed to generate the off-setting \$25,000 payment to Wynn and Grago just after Route 57-31 had made its first periodic payment to Homex in that sum. (GX 942; Tr. 4307).

As to Homex's recognition of modular sales, he admitted that he and Schulz jointly made many sales booking decisions and although attempting to minimize his own participation in this respect throughout 1971 and 1972, he did acknowledge the accuracy of several documents establishing his, his brother's and Yanowitch's reviews of the inclusion of the Clay and Southbridge sales in the October 31, 1970 quarterly financials given to and relied upon by commercial and investment bankers; two "sales" which he, Schulz and Yanowitch had all later noted as missing the required contracts and financing commitments. (GX 593-5, 627, 685, 795, 812, 859, 900; Tr. 4251-78).

David Stirling admitted, with regard to the Greater Gulf transaction, only that his signature appeared on the

earliest one of the contracts, that his handwriting appeared on a draft of what ultimately became the forged FHA commitment letter, and that he had subscribed his approval on Yanowitch's contemporaneously documented fear of looking "bad if there was an investigation" of the circumstances surrounding Phillips' relationship with Homex. (GX 108, 157-58; Tr. 4339; GX 1575; Tr. 4353-4355; GX 145; Tr. 4359-62). However, he denied any recollection of ever having seen the original forged FHA letter or of having once instructed Marshall to use a copy of that letter in securing a bank line of credit without leaving it or any other copies behind. (GX 112C, 990; Tr. 4355-57).

David Stirling's defense to the UBCJA stock transaction was threefold: (1) he had not initiated, requested or induced the stock purchases; (2) he had not guaranteed the loans and his signature had been forged on the guarantee letter; and (3) in any event, three lawyers (Yanowitch, Kramer and Kheel), knowing all the facts, had passed on the sufficiency of the disclosure in Homex's filings. (Tr. 4125, 4150, 4120).

In maintaining the first position, he generally denied that he and his brother had ever directly or indirectly pitched any of the labor officials to purchase Homex stock. (Tr. 4125). However, as to Ruggiano's specific testimony of two meetings with the Stirling brothers during which they had both pitched the stock as "a good thing and [that it would] go up and stuff like that and [that he] ought to buy in", and, in addition, reassured him to overcome his expressed doubts as to the legality of such purchases, he specifically denied on cross that it had happened "exactly like that" and instead seemed to recall only some "question of Mr. Ruggiano that he wanted to buy stock" and that they had told him "to check his own legal position". (Tr. 4125-6; compare Tr. 580-82). With regard to Langone's having counseled

against the appearance of a conflict of interest, David Stirling only recalled some "discussion" with no specifics "because Langone [had] raised the issue whether some of his [sic.] union officials should be allowed to purchase the stock at the \$16.50 issue." (Tr. 4129). However, at this point his memory ceased and he could recall nothing further as to the initial resolution of the issue, its later reopening, the backdating of the confirmations, the financing arrangements, etc. His memory was not aided by any of the contents of the "special stock list" file containing Yanowitch's handwritten notations throughout which included several notepad pages "From the Desk of David Stirling, Jr." memorializing the particulars of the seven UBCJA purchase transactions. (GX 866, 219 and 293; Tr. 4148-59). Moreover, since he had specifically denied having asked Marshall to cause Central Trust Co. to loan the purchase prices, he was unable to account for Yanowitch's having contemporaneously written that "7700 shares-designated . . . from D[avid] S[tirling] to K[en] Langone 8 C[hecks] came from C[entral] T[rust]." (GX 293, 866 at 88,130; Tr. 4153, 4158-9). And, of course, he also denied having promised Marshall that he would guarantee repayment of these loans, and contended that the signed letter in Central Trust's files to that effect was a forgery. (GX 291; Tr. 4159). Similarly, he denied that he falsified his expense voucher for the first Central Trust payment on January 5, 1971. (Tr. 4166).

Essentially, he claimed to have been kept in the dark as to any relationship between Central Trust and these transactions until the fall of 1971 when he and his brother learned only that Central Trust had several thousand shares of Homex stock in street names for which they had no buyers, which were related in some fashion, not specified, to "loans that didn't have a home and they were in quite a bit of trouble with it." (Tr.

4188). David Stirling admitted that he and his brother, through Yanowitch, persuaded Shea, to buy the stock by giving his note to Central Trust for approximately \$200,000. (GX 290, 234, 295; Tr. 4183, 4187-95). And, while denying any knowledge of the sellers' identity, he did admit that the \$200,000 considerably exceeded the market value of the stock and claimed only that they "expected the stock to go up" (Tr. 4189). Finally, even when confronted with his three 1976 admissions (in the form of his guilty pleas, but redacted sufficiently to mask their identity as such) that the delivery of the \$200,000 note to the Central Trust Company was a delivery of a thing of value to Ruggiano, Jacobs and Marsh because for their respective loan accounts, he claimed only to have learned of their roles months afterwards at about the time of the admissions which he acknowledged having made. (Tr. 4180-6).

Finally, the remaining admixture of defenses comprised a mixed bag: Felix Klein was the handwriting "expert" who, while certain that David Stirling's signature had been forged on the Central Trust letter guaranteeing repayment of the UBCJA loans, couldn't decide whether a failure to duplicate the crossing of a "t" indicated that it was "blatant and clumsy forgery" or "the best forgery [he] had ever seen." (Tr. 3602-3); David Clayton and Yves De Passille, David Stirling's employee-boyhood friends, supplied an alibi for his and his brother's absence from the Homex executive suite during the document purge session in order to contradict the secretary, Judith Howard Booth, who recalled that both of them had been present with Clayton and, later, Yanowitch (Tr. 3651-55, 3913-19 and 2297-2300); and David Stirling's own denial of either his having asked McCann to bring the cash receipts to his home or, thereafter, having paid him to take a trip to avoid being subpoenaed. (Tr. 9332-33).

2. William Stirling

William Stirling presented no evidence of his own.

3. Harold M. Yanowitch

Yanowitch testified in his own behalf. With respect to the Reseac transaction, he admitted having quoted the \$425,000 "sales" price, fixed as non-negotiable by the Stirlings to his former clients, Barbato, Shapiro and Falcone, but denied having either guaranteed them against any losses, or otherwise having verbally assured them that Homex would remedy the zoning restriction. (Tr. 4441, 4457-58, 4725). Yanowitch gave no testimony on direct examination as to either the Kece or Route 57-31 transactions.

The bulk of Yanowitch's direct testimony centered on the Greater Gulf transaction and his claims that Phillips had provided the forged FHA commitment letter in fulfillment of an oral promise made, on February 20, 1971, to him by the FHA officials, Wise and Richardson, that such would be forthcoming (Tr. 4545-47). On cross, he was forced to admit that he had originally testified, during the bankruptcy and SEC proceeding, that he had not met Phillips, Wise and Richardson in Avon, on February 20, 1971, but had only met them in Mississippi on February 26, 1971, and that he had nothing to do with drafting what became the FHA commitment letter—despite his handwriting being on the drafts of it. (GX 157-58; Tr. 4681-95).

Finally, he denied altogether that there had been any secrecy attendant on the copy of the forged FHA letter, not the original, which he claimed was received in Avon, and, specifically (1) that he and Schulz had discussed at any time, limiting Dienstag's authority to disclose the

deal to outside parties, such as Shea Gould or Brown Wood; (2) that he Mauriello had discussed the latter's returning to him the copy previously supplied together with the deletion of all references to it in his draft accounting opinion, and (3) that he had declined to furnish PMM a copy citing either political considerations or an upcoming news release; denials which, in all three instances, contradicted testimony and corroborative documentary proof. (GX 620; Tr. 2838-40; GX 6677; Tr. 2594; GX 707 at 21,031; Tr. 3535-7, 3468; Tr. 4718-22).

With regard to the SEC-bankruptcy investigation, he specifically denied having ordered Booth, his former secretary, to destroy all of her steno pads containing his dictation throughout the 1970 to 1972 period. (Tr. 4695-6; contrast Tr. 2307). In addition, he also denied that she had packed and removed to his basement numerous Homex legal files, including a chronological file of all of his correspondence and, on his direct instruction, redistributed the files throughout the Homex cabinets so as to eliminate the visible gaps left by the removals. (Tr. 4672-7; contrast Tr. 2296-300).*

4. Edwin J. Schulz

Schulz did not testify. He called only one witness, J. T. Woods, the PMM audit manager, in an unsuccessful attempt to prove that he had not deliberately hidden Homex's history of mass reassignments and cost overruns from them. As to the latter, the proof

* Under the District Court's ruling, by deliberately omitting to offer any direct testimony as to the UBCJA officials stock transactions, he was not crossed on that subject at all; excepting a single question on his having ordered McCann to cash the \$11,500 in checks on January 6, 1971, which he promptly denied. (Tr. 4722).

amounted to PMM's having discovered overruns and having been satisfied that management's collectibility assurances were adequately supported with certain documents. As to the reassignment history, Woods quite clearly explained that the reassignments known to PMM (less than 10% of the whole) had been explained by management as the result of a single customer's changing from one model to another—not at all a Homex management practice of treating all modules as fungibles. (Tr. 4780-01).

5. Rubel L. Phillips

Phillips testified in his own defense, and, in addition, offered the testimony of several individuals including character and alibi witnesses. In general, he denied having agreed with Yanowitch, on the latter's promise to safeguard and insure that the truth would not be exposed, to forge the FHA commitment letter, or having thereafter done so by causing his secretary to trace the signature, having falsified other documentation with regard to the Greater Gulf transaction, and having previously admitted the forgery to Richardson in a successful effort to induce him also to suppress the truth during the period of the SEC-bankruptcy investigation.

The Government's Rebuttal Case

Allan Kramer and Theodore Kheel testified in rebuttal. Kramer testified that at no point during the period encompassed by the Route 57-31 transactions was he advised that there had been an assignment of the condemnation award to the First National Bank of Rochester. (Tr. 5414-17). Kheel testified that at no point during his association with Homex was he advised that the seven UBCJA officials had been proposed and then included as purchasers of Homex stock. (Tr. 5375-78).

ARGUMENT

POINT I

The District Court Acted Properly in Refusing To Narrow the Indictment Against the Defendants. Appellants' Reliance Upon *United States v. Natelli* is Misplaced and the Evidence Was Sufficient as to all Aspects of the Indictment.

David Stirling, Yanowitch and Schulz each claims that the District Court committed reversible error, under this Court's decision in *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), in its refusal to charge the jury that as to him it had withdrawn from the jury's consideration various specified allegations.* All three assert a failure of proof as to some, but not all, of the parts of the scheme alleged in Count One (incorporated by reference as such in all the remaining counts except the conspiracy charge in Count Nine, where they were incorporated by reference as additional overt acts). Because this withdrawal instruction was not given, the jury's verdicts, so the argument runs, are rendered fatally ambiguous and curable only by a new trial under proper instructions. The argument is both factually and legally erroneous and should be rejected. The *Natelli* decision is entirely inapposite to this case, and does not require reversal. In addition,

* William Stirling, who apparently adopts David Stirling's argument here, made no request of the court to strike or to give any narrowing charge whatsoever. Accordingly, he is remitted to arguing that the denial of his Rule 29 motion for a judgment of acquittal was erroneous. This point is discussed under Point III, *infra*, and, since William Stirling's brief does not specify for this Court any complaint as to withdrawal of any particular part of the indictment, no separate discussion is here undertaken.

the evidence supporting each of the challenged portions of the indictment was more than sufficient.

A. The *Natelli* decision does not require this Court to review the sufficiency of the evidence on each specification of fraud.

Defendants David Stirling, Schulz and Yanowitch claim that Judge Frankel erred in allowing the jury to consider the charges against them on various enumerated means of fraud contained within each count of the indictment on the ground that the evidence against them was insufficient to permit conviction on the basis of those challenged paragraphs and parts of paragraphs. Defendants further claim that under *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), this was reversible error on Judge Frankel's part. This claim is without merit.

Even apart from the Government's proof of *all* of the specifications contained in the indictment, defendants fail to set before the Court the differences between their case and that of *Natelli* and his co-defendant Scansaroli which make the *Natelli* decision inapposite. *Natelli* and Scansaroli, two outside auditors of National Student Marketing Corporation, were tried on a single count alleging violation of the securities laws in that they made or caused to be made false and misleading statements in a proxy solicitation. Two specifications of false statements were set out in the one count of the indictment, but they were not unified through the allegation that they were part of a single scheme to defraud, nor were the defendants joined together through a count alleging conspiracy or by a jury instruction on joint ventures. Both the two aspects of the crime and the criminals were presented as separate and distinct entities. There was, moreover, an improper submission

to the jury to the question of Scansaroli's guilt in connection with one false statement, which this Court held as a matter of law should not have been put to the jury in light of the limited responsibility which Scansaroli, an associate unlike partner Natelli, exercised within their accounting firm's hierarchy.

In the present case a unified scheme to defraud was alleged and proved, perpetrated by a band of defendants who had joined in the object of the scheme and in carrying it out by the means alleged in the indictment. In addition, and again unlike *Natelli*, a conspiracy count charging all the defendants with the broad scheme and again detailing the same pattern of means was set out, and the defendants were convicted on that count. Finally, on the basis of the indictment and the facts, the court charged the jury under the principles of *Pinkerton v. United States*, 328 U.S. 640 (1946), that once the jury was satisfied that a defendant was a member of the conspiracy he could be held criminally liable for the foreseeable acts of his co-conspirators committed in furtherance of the conspiracy. (Tr. 6063, 6020-21).

The legal and factual posture of the two cases makes the analysis of *Natelli* offered by defendants inapplicable and misleading. First, *Natelli* only suggested an instruction to the jury that they must be unanimous on the basis of finding guilt when two or more separate and discrete bases for guilt are combined in a single count. It did not generally require a charge on unanimity as to parts of a count in cases not coming within its particular pattern of facts, and it certainly did not suggest that convictions in fraud schemes would be routinely reversed if the proof was insufficient as to one of several means of the fraud. *Natelli* simply held that when "there is more than one specification as a predicate for guilt, each dependent on particular evidence which is unrelated

to the other, it would be sound practice to instruct the jury that they must be unanimous on a particular specification to convict." 527 F.2d at 325.*

Second, defendants do not address themselves to the admissibility of evidence under the conspiracy count. Regardless of whether there was sufficient evidence against the defendants on all or part of any substantive counts—although, as we shall demonstrate, the evidence was sufficient—the jury was entitled to consider all the evidence against each defendant in weighing the conspiracy count. *United States v. Lubrano*, 529 F.2d 633 (2d Cir. 1975), *cert. denied*, 45 U.S.L.W. 3249 (Oct. 4, 1976); *United States v. Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976); *United States v. Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974). For this reason, the so-called *Natelli* requests to charge submitted by the defendants were improper: even if, *arguendo*, there were insufficient evidence to convict a defendant of a substantive crime on the basis of one of the alleged means of fraud in which he was named, that defendant was not entitled to an instruction prohibiting the jury from considering his role in that alleged means of fraud, as is suggested by the defendants. StBr. 44; YBr. 51; ScBr. 53. The defendants were at most entitled to a charge that the jury was not to consider the evidence against the defendant set out in the challenged paragraph as a basis for conviction on a substan-

* Exactly such a charge was given by Judge Frankel on Count Two of the Indictment, the count charging misstatement or omission of material facts in the Merrill Lynch prospectus. (Tr. 6034-36). This was the only count of the indictment that was analogous to *Natelli*, and the dictates of that case's holding were carefully followed in the court's charge.

tive count but it was to consider that evidence against the defendant in deciding whether or not he was a member of a conspiracy or joint venture and in deciding whether the object of the conspiracy or joint venture was that set out in the indictment. Defendants did not request a charge which properly stated the law on this point. Where a legally incorrect request is presented, defendants cannot claim that the district court committed error by rejecting it. *United States v. Jenkins*, 510 F.2d 495, 498 (2d Cir. 1975); *United States v. Lam Lek Chong*, 544 F.2d 58, 68 (2d Cir. 1976); *United States v. Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

Third, defendants do not consider the full ramifications of their position under *United States v. Pinkerton*, *supra*. The basic teaching of *Pinkerton* is that a member of a conspiracy may be convicted of substantive crimes in which he took no direct part and for which the evidence of direct participation is thus utterly insufficient for conviction; indeed, one of the Pinkerton brothers was in prison at the time at which some of the substantive crimes of which he was convicted were committed. That basic principle of vicarious liability makes unnecessary any proof that a defendant convicted of conspiracy actually engaged in the substantive crimes of which he is found guilty when it is shown that a co-conspirator or joint venturer did the prohibited act in furtherance of the conspiracy, that such acts were foreseeable to the convicted defendant, and that the defendant was a member of the conspiracy at the time of the act.

None of the defendants claims insufficiency of the evidence as to every means of fraud. Schulz concedes the sufficiency of the evidence as to paragraphs 13 and 15(a); David Stirling, Jr. made no motion to strike at all, and his request to charge conceded paragraphs 12

and 16 and parts of paragraphs 10 and 11; and Yarowitch made no motion to strike at all and his request to charge conceded paragraphs 13, 14 and 16 and part of paragraphs 10-12. Thus, the defendants have implicitly conceded that the jury had sufficient evidence to find that they had joined the conspiratorial object * by one or more of the prescribed means.** Once the jury reached the conclusion that each was a member of the conspiracy, the court's instructions—which defendants do not challenge—entitled the jurors to hold each defendant liable for the foreseeable acts of his con-conspirators. (Tr. 6063-65). In these circumstances—which were totally absent in *Natelli*—the conviction of each defendant on all eight of the substantive counts was properly supported by the unanimous verdict of the jury on the conspiracy count.

B. The jury did not consider the case on an erroneous theory of the law; thus, even if the Court finds the proof as to any given means of fraud insufficient, there is no basis for reversal.

The appellants' reliance on *Natelli* is misplaced for a further reason as well. In *Natelli*, the jury was not properly instructed on the scope of Scansaroli's responsibility nor, in the circumstances, properly charged on the unanimity necessary for conviction. Thus, the decision is the latest expression in this circuit of a well-established line of cases which hold that when a jury has rendered a general verdict on a count presented to it at least in part

* There is—and can be—no claim that the conspirators did not have a common *object*. (Cf. *United States v. Rosenblatt*, Dkt. No. 76-1443, slip op. 3031 (2d Cir. April 19, 1977)).

** This concession is not only inherent in the defendants' posture in their *Natelli* motions, it is underscored by their failure to raise any argument as to the agreement aspect of the conspiracy conviction.

on the basis of erroneous or flawed legal instruction, the verdict will be reversed even where evidence might well have supported conviction if the case had been presented to the jury solely on a sound legal theory.* This result is

* The cases following this principle and reversing convictions arise in a wide variety of circumstances. *Stromberg v. California*, 283 U.S. 359, 367-8 (1931) (violation of statute written in disjunctive; court instructed that conviction could be had on any one of the prohibited acts, including act protected by First Amendment); *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942) (violation of bigamous cohabitation statute went to jury on two theories, one of which was held to be barred by the full faith and credit clause of the constitution); *Cramer v. United States*, 325 U.S. 1, 36 (1945) (treason conviction challenged on ground that overt acts did not show constitutionally required giving of aid and comfort to the enemy; if any overt act does not meet that legal standard, conviction must be set aside); *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949) (jury instructed that ordinance prohibited constitutionally protected speech as well as other acts); *Yates v. United States*, 354 U.S. 298, 312 (1957) (conspiracy to violate Smith Act alleging two objects, one found to be barred by statute of limitations); *United New York and New Jersey Sandy Hook Pilots Ass'n. v. Halecki*, 358 U.S. 613, 618 (1959) (wrongful death action given to jury on two theories; that of unseaworthiness found inapplicable); *United States v. Guterma*, 281 F.2d 742, 747-8 (2d Cir.), cert. denied, 364 U.S. 871 (1960) (securities violation based on two transactions; judge improperly denied request to clarify prejudicial instructions on omitted facts of one transaction); *United States v. Borelli*, 336 F.2d 376, 385 (2d Cir. 1964) (two phase narcotics conspiracy; court failed to charge that if jury found insufficient evidence to link defendant to second phase it must find first phase not barred by statute of limitations); *United States v. Koch*, 113 F.2d 982, 983-84 (2d Cir. 1940) (one theory submitted to jury erroneous); *United States v. Adcock*, 447 F.2d 1337 (2d Cir.), cert. denied, 404 U.S. 939 (1971) (charge of three false statements to Immigration Service; jury improperly instructed on meaning of "preparer" relevant to one assignment of falsity); *United States v. Brecht*, 540 F.2d 45, 50 (2d Cir. 1976) (jury instructed that it could find violation of Travel Act on basis of either commercial bribery or larceny by extortion; Travel Act held not to cover commercial bribery).

reached because a reviewing court cannot determine whether the verdict rests on the jury's application to the facts of the erroneous legal doctrine or a proper one.

These cases stand in distinction to those in which there is simply an evidentiary insufficiency as to part of a count which the court has allowed to go to the jury. In such cases, the reviewing court does not look behind the jury's general verdict and refrains from upsetting a conviction on the speculation that the jury, applying the proper law to the facts, may have chosen to convict where there was insufficient evidence while deciding not to convict on the grounds where the court finds sufficient evidence. *Cf. United States v. Zane, supra*, at 691. Cases of this nature arise in a variety of circumstances. The most obvious are statutes written in the disjunctive which are set out in the indictment in the conjunctive and in which convictions are supported by sufficient evidence as to less than all of the modes of committing the offense. *Turner v. United States*, 396 U.S. 398, 420 (1970), sets out the basic principle:

"The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged."

See Crain v. United States, 162 U.S. 625, 634 (1896).*

* This point was not fully briefed by the Government in *Natelli*. The Court indicates in its third opinion that a proper request to the trial court would preserve an objection on insufficiency of the evidence though that may not be as true in cases charging alternate ways of violating a statute stated in the disjunctive as in other circumstances, 527 F.2d at 328. As support for the first point, the court cites *Stromberg v. California, supra*. *Stromberg* does not support the proposition. The point was not preserved in the trial court in that case. *Terminiello v. Chicago, supra*, at 5. Moreover, *Stromberg* involved a statute stated in the disjunctive.

The rule is well recognized in this and other circuits. *United States v. Astolas*, 487 F.2d 275, 280 (2d Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *United States v. Barbato*, 471 F.2d 918, 922 (1st Cir. 1973); *Joyce v. United States*, 454 F.2d 971, 976 (D.C. Cir. 1971); *cert. denied*, 405 U.S. 969 (1972); *United States v. Ippolito*, 438 F.2d 417 (5th Cir.), *cert. denied*, 402 U.S. 953 (1971).

This Court has reached the same result in cases in which the defendant has sought to force the Government to elect the theory on which a case is presented to the jury and the district judge has denied that request. Despite the preservation of the point in the District Court and the patent ambiguity on appeal as to the facts found in a general verdict resting on a charge containing mutually exclusive theories, this court unhesitatingly affirmed the conviction where the evidence supported a violation of the statute in *either* of the ways charged. *United States v. Conti*, 361 F.2d 153, 158 (2d Cir. 1966), *vacated on other grounds sub nom. Stone v. United States*, 390 U.S. 204 (1968) (charge allowed jury to find defendant guilty as either principal or agent).*

In cases where a conspiracy charges multiple objects or means and the reviewing court finds that any one of the objects considered by the jury was sufficiently supported by the evidence, the appellate courts have consistently refused to reverse convictions. *United States v. Mack*, 112 F.2d 290 (2d Cir. 1940); *Moss v. United States*, 132 F.2d 875 (6th Cir. 1943); *United States v. Tanner*, 471 F.2d 128, 140 (7th Cir.), *cert. denied*, 409

* This Court's decision in *United States v. Droms*, Dkt. No. 76-1232, slip op. 579 (2d Cir. Feb. 25, 1977), demonstrates that *Conti* and the *Turner* line of cases retain their vitality in this circuit after the decision in *Natelli*.

U.S. 949 (1972); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975);* *United States v. Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Bernstein*, 533 F.2d 775, 793 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 523 (1977).** A further corollary to this rule is found in those cases where a conviction on some counts of an indictment containing a conspiracy charge is overturned or questioned because it was presented to the jury on an erroneous legal theory. In such cases the court has been particularly careful to assure itself that the jury has convicted on the basis of a conspiratorial object other than that founded on a legal infirmity. *United States v. Bottone*, 365 F.2d 389, 394-95 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *United States v. Jacobs*, 475 F.2d 270, 282-84 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973); *United States v. Dixon*, 536 F.2d 1388, 1401-02 (2d Cir. 1976). The unstated teaching of these cases is that where a case has gone to the jury on an erroneous legal theory which affects a stated object of a charged conspiracy, the

* The opinion in *United States v. Papadakis*, 510 F.2d at 297, succinctly summarizes the principle:

"Where a conspiracy has multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that an appellant agreed to accomplish at least one of the criminal objectives."

** We do not address here, and in light of the defendants' claim need not address, the *caveat* in *United States v. Papadakis*, *supra*, 510 F.2d at 297, which raises the question of unfair prejudice from evidence presented on a factual contention which is not ultimately proved. The only prejudice from the admission of evidence claimed by the defendants is that of the Stirlings and Yanowitch on the labor issue, on which they made no withdrawal motion. At any rate, as this Court noted in *United States v. Dillard*, 101 F.2d 829, 834-35 (2d Cir. 1938), such prejudice cannot reasonably be seen as occurring with respect to the very men who formed the core not only of the company but of the fraudulent scheme.

court will affirm only where there is likelihood that the jury applied the correct legal theory to the facts in reaching its verdict.*

The Seventh Circuit in *United States v. Baranski*, 484 F.2d 556, 559-61 (7th Cir. 1973), made the proper distinction in considering whether or not to reverse an ambiguous general verdict. *Baranski* involved a conspiracy conviction in which one of the objects of the conspiracy was found to be constitutionally protected. The court reversed in light of the fact that the case had gone to the jury on an erroneous legal instruction and it distinguished its earlier ruling in *United States v. Tanner*, *supra*, in which it refused to upset a conviction where the dispute went only to the sufficiency of the factual proof on one object of the charged conspiracy. This distinction allows both judges and juries to fulfill their

* If the Court were to reverse convictions where a jury is charged on the basis of a statute worded in the disjunctive or a conspiracy or scheme to defraud with multiple objects or means, and the reviewing court later found the evidence factually insufficient as to less than all of the charged modes of violation, it would also call in question other settled areas of the law. The rule against special verdicts which this Court bluntly reaffirmed in *United States v. Adcock*, *supra*, would come into serious question since it would provide an obvious method for avoiding retrials of lengthy and complex cases where the appellate court disagreed with the trial court as to the sufficiency of some particular part of the evidence. Alternatively, the rule against multiplicitous indictments might be attacked since the drafting of indictments with separate means or objects of conspiracy or fraud set out in separate counts combined with the sentencing doctrine of such cases as *United States v. Stewart*, 513 F.2d 957 (2d Cir. 1975) and *United States v. Pravato*, 505 F.2d 703 (2d Cir. 1974), would provide another method of avoiding unnecessary retrials. Such a position could also call into question the propriety of inconsistent verdicts, long sanctioned under *Dunn v. United States*, 284 U.S. 390 (1932).

historic functions in the trial process—the judges assure that the law which the jury receives is sound and accurate and leaves to the jury the application of the law to the facts except in extreme cases of error. This honors the presumption that jurors are sufficiently competent and their position as triers of the facts sufficiently secure that their factual determinations will only be disturbed where there is a manifest necessity to do so.

In this legal context, *Natelli* should not be read as licensing reversal of any count in which the evidence as to *every* specification, means of fraud, or conspiratorial object charged is not sufficient. To do so would be to read it as *sub silentio* overruling of wide and well-established precedent.*

C. The evidence was more than sufficient to deny the requests to instruct the jury that charges had been withdrawn.

1. David Stirling

David Stirling's argument is premised on the District Court's refusal to give the following instruction:

"With regard to the defendant, David Stirling, Jr., I instruct you not to consider the charges against him as set forth in paragraphs 10 and 11 of Count 1 in the Indictment in so far as they pertain to the so-called Reseac sale. I further instruct you not to consider the charges against him contained in paragraphs 13, 14 and 15 of Count 1 of the Indictment.

* Though it does not discuss *Natelli*, this Court's ruling in *United States v. Droms*, *supra*, indicates that no such broad and unstated implications are to be read into that decision.

I further instruct you not to consider the said charges against him as they may be incorporated into the other counts contained in the Indictment." (St-YApp. 171).

The district court had repeatedly solicited any defendant "who claims some particular interest in the kind of guidance for the jury that was prescribed by the *Natelli* case" to submit proposed instructions "covering that subject." (Tr. 3751).^{*} In response, the Government submitted a memorandum asserting that because considerations of vicarious responsibility predominated in this case, unlike *Natelli*, a bald "withdrawal from your consideration" charge was far too broad to be given without also giving unnecessarily complex further instructions circumscribing in a detailed fashion the precise difference between jury "consideration" of a given defendant's responsibility for the precise paragraph as the direct actor, as a co-conspirator under *Pinkerton*, as a co-venturer, or an aider and abettor. (ScApp. 142-49). Nevertheless, David Stirling's request made no effort to narrow within proper limits the compass of his several claims under the five different paragraphs. Indeed, his current brief asserting claimed failures to prove four of the five specifications without discussion of his vicarious liability still does nothing to focus or clarify this issue. (StBr. 46). Even so, he ignores sufficient direct proof which in each instance establishes his direct responsibility.

^{*} Furthermore, Judge Frankel's solicitation of counsel's guidance was quite specific. He wanted:

" . . . to know what portions of the indictment you claim are the exclusive portions on which your client could theoretically be convicted and how the jury ought to be instructed to focus on that and what they ought to exclude from their thinking and the requirements, of course, of unanimity to convict." (Tr. 3751-52).

(a) Paragraphs 10 and 11

The indictment, in Count One, paragraphs 10 and 11, alleged joint responsibility for the stated means of fraud without specification of whether in a particular defendant's case the liability was direct, vicarious or some combination of the two. In its bill of particulars, the Government made explicit its intention to argue vicarious responsibility to the jury (St-Y App. 96-97). Contrary to his claim that the Government has "utterly failed" to prove his involvement in the Reseac transaction (StBr. 96), David Stirling was shown to have had a direct role in the fabrication of the original transaction. He personally ratified Yanowitch's oral promises to Barbato and Falcone to either "take [the property] back or find a purchaser" at a meeting of the four. (Tr. 856-57). In addition, he added his verbal guarantee against "losing any money" on the transaction. (Tr. 888). When colored by Yanowitch's statement that both of the Stirlings had set the \$25,000 sales price as non-negotiable (Tr. 4441, 3094), these three representations constituted a sufficient basis for the jury to find that David Stirling performed the more important of the acts alleged in paragraph 11. His knowledge of the deterioration of the Reseac receivable was shown by his admitted receipt of Karkow's warning memorandum (GX 600; Tr. 4226-7); as was his knowledge of the written plan thereafter to effect a "conveyance of the [Reseac] stock" (GX 627 at 64, 986; GX 859 at 99,204). His stipulation (Tr. 5963-64), charged to the jury (Tr. 5997), that a side agreement between seller and buyer to accept the property back "if some contingency arises" would render the transaction not a true sale, at least when read in light of his actual knowledge of the SEC's ASR No. 95 concerning land sales (Tr. 1523-34), put the matter beyond dispute. 15 U.S.C. § 77aa (24-26) and

(30); 17 C.F.R. §§ 210.1-02(a) and (c), 210.5-02, 230.405(a) and (f), 230.408 and 230.410; cf. *United States v. Guterma*, 281 F.2d 742, 745 (2d Cir.), *cert. denied*, 364 U.S. 871 (1960); *United States v. Colasurdo*, 453 F.2d 585, 593-94 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 34-35 (2d Cir. 1976); compare, AICPA Statement on Auditing Standards, No. 6, Related Party Transaction (July 1975).

(b) Paragraph 13

Paragraph 13 alleged joint responsibility for misleading the SEC, Homex auditors and the investors by repeated omissions to disclose a vast reassignment history while positively asserting that Homex recognized revenue when manufactured modules were assigned to specific contracts. Here again David Stirling was shown to have personally participated in the decision on the recognition of income. He admitted that he and Schulz had together arrived at such decisions on a job-by-job basis for at least the first two years and, thereafter, the finance committee minutes recorded his, his brother's and Yanowitch's review of at least those half dozen decisions for the projects accounting for sales for the first quarter ended October 31, 1970. (GX 594-5; Tr. 4251-57, 4270-77). The vast bulk of that sum was from the Clay and Southbridge projects which were segmentally reversed throughout January and February, 1971, until eliminated entirely by the Greater Gulf entry at the end of February. The jury could find David Stirling's direct participation from the foregoing admissions and the size of the Greater Gulf "sale", without which profits for the six and nine months periods would have been so markedly

different that no chief executive officer could have escaped learning about such a matter.*

(c) Paragraphs 15(a) and 15(c)

Abandoning his original request that the jury be instructed to ignore paragraph 15 in its entirety, David Stirling now concedes sufficiency as to the Greater Gulf-US Shelter portions contained in subparagraph (b); as to sub-part (a), the jury had Schulz's memorandum to David Stirling flatly proposing that PMM be mislead by withholding information as to the Homex cost overrun problems.**

Four days later, in Yanowitch's weekly written report to both of the Stirling brothers, he recited:

"Additional costs requested for Batavia, Erie, Rochester, Sanford and Worcester have been thoroughly reviewed with Herman Hillman, Rosfield's office, Ed Schulz and Ruben Davis. Letters have been sent to HUD in Washington and a satisfactory reply will be forthcoming. This has

* Indeed, the weakness of David Stirling's position here is perhaps best underscored by his abandonment on this appeal of the original request to withdraw the Greater Gulf transaction as alleged in paragraph 14. Having now conceded that "reasonable men may well have differed" (StBr. 46) as to his having directly effected that transaction through Phillips, Schulz, Yanowitch and other subordinates, it seems clear that the jury was justified in finding that he also directly effected the reassignments through Schulz and others which, after all, was the whole *raison d'être* for Greater Gulf.

** "The Company's position relative to the additional funds requested from the Department of HUD for completed or partially completed projects probably should not be discussed with Peat, Marwick, Mitchell since it could tend to indicate our uncertainty as to the collection of these funds." (GX 817 at 90,399).

reference, of course, to accounting requirements. The actual down-to-earth effort to acquire the additional costs will commence in early February." (GX 456 at 76,417).

These two documents, together with the proof that such phony HUD letters were in fact relied upon by PMM to support carrying over \$2,000,000 in overrun receivables at July 31, 1971, without any reserve, were sufficient to support David Stirling's knowledge in this respect. (Tr. 4769-73; ScX B-31; Tr. 4763-64).*

As to subpart (c), the jury had David Stirling's own accounting policies memo of February 18, 1971, supplied to PMM two days later, proposing the capitalization of \$832,000 in expenditures. (GX 808 at 95,720). When this was written there was simply no such reimbursement agreement, and when, on March 17, 1971, David Stirling signed the agreement it contained no provision for reimbursement. (GX 9 at 43,029-119). In the interim, Schulz had sent the Homex proposed auditor's position paper to Stirling, his brother and Yanowitch. (GX 398). Its representations to PMM were so squarely inconsistent with those given earlier to HKF that the jury had a written basis—known to Schulz, the Stirlings and Yanowitch—for finding a concealment of material information about the adjustments to these deferred accounts from Homex's auditors. (GX

* Moreover, David Stirling and Schulz both discussed this subject with PMM on August 18, 1971, without volunteering any disclosure that \$500,000 of that sum actually had been accumulated in the previous fiscal year, but deliberately kept off the income statement by delaying the appropriate accounting entry. (Tr. 3310-12; 4769-74). Nine months later, following a warning memorandum to both Stirlings and Yanowitch from a Homex attorney, \$1,619,000 was established as a reserve against this receivable. (GX 612 at 55,531; GX 28 at 42,746).

668). Finally, David Stirling personally signed both of the audit representation letters, dated March 22, 1971 and September 15, 1971, which negated "contingent assets" and any post period events, such as, for example, signing the Mississippi plant contract without a reimbursement clause, necessitating "adjustments" to the accounts. (GX 395A and 396A; compare GX 634 at 56,516 ¶ 4 with GX 398).

2. Harold M. Yanowitch

At the close of the Government's case, Yanowitch, like David Stirling, made no motion to strike any portions of the indictment or of the evidence supporting it or to otherwise withdraw any particular portion of the charges or aspect of the Government's case. At the close of all the evidence, his counsel responded to the Court's invitation to request a charge by proposing the following:

"As to the defendant Yanowitch, I instruct you not to consider the charges against him as set forth in Paragraphs 10, 11 and 12 of the Indictment as they pertain to the 57-31 and Peter Thune [sic] land sales.

I further instruct you not to consider the charges against him as contained in paragraph 15 of the Indictment." (St-Y App. 172).

Aside from the unduly broad terms of the request, each of the factual premises for the request was erroneous.

(a) Paragraph 10-11

With regard to the Kece transaction, Yanowitch himself signed both of the deeds to Kece, and, within days, drafted the letters to Thun and Kece outlining Homex's commitment to erect the 330 units at some un-

specified future price. (GX 72-73 and 78-79; Tr. 3097-99, 3153-54). Significantly, Yanowitch tailored his testimony to David Stirling's and, accordingly, did not claim that he had inquired of David Stirling in this regard and received an inadequate report; that being so, there was simply no basis or warrant for the jury's assuming that David Stirling mislead Yanowitch at all about the deal.*

In addition, Mauriello, had called his attention to the several factors listed by the SEC in ASR No. 95 in connection with their discussion of its applicability to the Route 57-31 transaction, which also applied equally to the Kece transaction. Two months later, on April 29, 1971, when HKF insisted on the additional disclosure of the shell character of Route 57-31, Yanowitch had been sufficiently appraised of the need for the same sort of disclosure as to Kece for the jury to find, as it was properly charged, that if he did not actually know, he must have "deliberately closed his eyes to what otherwise would have been obvious to him and with a conscious purpose to avoid learning of the truth." (Tr. 6014). Thereafter, in July 1971, the SEC threw out the Route 57-31 "sale" on the only basis known to it—low down payment and shell character—and Yanowitch then signed the final amendment to the registration statement which revealed neither of those same facts for the Kece transaction. (GX 12).

* In any event, Yanowitch's total failure to even claim that he pursued the matter constitutes a default under the "affirmative duty to investigate" imposed upon him by the securities laws. See *United States v. Squires*, 440 F.2d 859, 863 (2d Cir. 1971), distinguishing the "cases cited by the Government" which included, at p. 7 of its brief, *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir.), *cert. denied sub nom Howard v. United States*, 377 U.S. 953 (1964) and *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970).

(b) Paragraph 12

Paragraph 12 alleged joint responsibility for the Route 57-31 transaction. Contrary to the conclusory assertion in his brief that "the prosecution utterly failed to prove Yanowitch's involvement in . . . the 57-31 transaction" (YBr. 52), the evidence showed that Yanowitch received a sufficient report of David Stirling's negotiations with Gragc and Wynn to instruct Davis personally to prepare the contracts and to obtain Mauriello's opinion. (Tr. 1263-69). The absence from those documents, later filed with the SEC as "all" of the material contracts with Route 57-31 (15 U.S.C. § 77aa(30); GX 9), of the David Stirling guarantee against losses was just as deliberately related to avoiding disclosure during the underwriting as was Yanowitch's own refusal in 1969 to put into writing the Reseac guarantees which were explicitly not recorded because of the public offering. (Tr. 926).^{*} Furthermore, Yanowitch's and Schulz' January 6, 1971, review with Mauriello of each of the SEC's ASR No. 95 factors supplied a firm basis for the jury's finding that he knowingly omitted to disclose the shell character of Route 57-31 until later overridden by HKF's ultimatum. *Herzfeld v. Lavenhol, Krekstein, Horwarth & Horwarth*, 540 F.2d 27, 34-35 (2d Cir. 1976).

(c) Paragraph 15

Yanowitch's entire one-sentence argument amounts to no more than a conclusory assertion of evidentiary insufficiency as to "accounting matters, essentially falling

^{*} Yanowitch's denial of actual knowledge of the backdoor financing arrangement with the First National Bank of Rochester did not require acceptance in the light of both Marshall's and Davis' contradictory testimony, contemporaneously documented. (GX 58, 61; Tr. 1317-8).

within Schulz' exclusive competence". (Y Br. 53). In point of fact, Yanowitch and Schulz collaborated with one another and with both of the Stirling brothers with regard to numerous accounting matters including specifically those mentioned by paragraph 15. With regard to the cost overrun problems encompassed by sub-part (a), while Schulz' January 21, 1971, memo to Yanowitch does not actually recite the decision to delay the entry from the previous period, it does propose recordation of installation division cost overruns as "additional sales" without any contractual commitment beyond a HUD letter that it would "review" requests for additional funds beyond the terms of the original, fulfilled-by-payments, contracts. (GX 634 at 56,518-9 ¶ 2). As noted above pp. 66-67, *supra*, three weeks later Yanowitch's weekly report to the Stirling brothers noted the receipt of the HUD letters in order to give PMM the false impression that they represented a real collection effort, when in truth and in fact, such was non-existent. (GX 456 at 76,417). With regard to the Greater Gulf-US-Shelter fee set forth in sub-part (b), Marshall and Phillips both testified that Yanowitch drafted the finance fee contract which was thereafter backdated into the accounting period. (GX 115, 187-88; Tr. 2050-53, 4958-61). The accounting for such fees in the financial statements of US Shelter, as an unconsolidated financing subsidiary, had been the subject of extensive discussions with the auditors and Mauriello, all of which were memorialized in the Schulz-Yanowitch-Stirlings memoranda. (GX 634 at 56,505-12; GX 815 at 95,300). Finally, with regard to the \$832,000 capitalization item of sub-part (c), while Yanowitch did not actually sign the management representation letter to PMM, he did receive both of the memoranda establishing the inconsistent representations to HKF and PMM, and, more importantly, he did actually sign with David Stirling the bond offering contract which failed to provide for any reimbursement of the \$832,000. (GX 9, 398, 634, 815 at 95,098).

3. Edwin J. Schulz

At the close of the Government's case, Schulz did not move to strike any of the evidence or any portion of the indictment, although he did indicate that as part of his Rule 29 motion for a judgment of acquittal as to Counts 1 and 9 that he wanted to make seven separate motions as to each of paragraphs 10 to 16, and an eighth motion as to Count 9, paragraph 2. (ScApp. 152; Tr. 3571). When Schulz explained that what he wanted was a charge on these items, the District Court rejected his separate motions in favor of studying Schulz' charges when submitted, and Schulz then moved for a "judgment of acquittal on each and every count" without elaboration of any reasons. (Tr. 3572; ScApp. 153). Four days later, he submitted proposed charges and also moved to withdraw from jury consideration, in Count 1, paragraphs 10 through 15 (except for paragraph 15(a)) and in Count 9, paragraph 2 (Tr. 3984). In addition, and for the first time, he asked for the same sort of thing in Counts 2 through 8. Essentially, the requested charges tracked this motion, and sought to impose upon the jury a requirement that it achieve unanimity as to some but not all of the evidence of Schulz' contributions to the scheme. No effort was undertaken to relate this unanimity requirement to any of the other allegations in the various Counts or to the substantial proof beyond paragraphs 13 and 15(a) upon which a verdict might also have been independently based.*

* For example, during fiscal 1971, Schultz had booked \$3,720,000 of "sales" for a Virgin Islands project which was cancelled by the customer in August 1971. This was after year-end but before completion of the audit and release of the financials. (GX 568, 573; Tr. 1320-22). Both Stirling brothers, Yanowitch and Schulz were involved in a joint effort to avert this cancellation, which had been caused by insuffi-

[Footnote continued on following page]

Finally, even as to Count Two, Schulz' motion and instruction suffered from the same deficiencies—no motion was made to strike the particular false statement or alleged omission from the indictment, nor any additional motion to strike evidence not otherwise independ-

cient financing, and Schulz actually traveled to the Virgin Islands after the receipt of the cancellation telegram and before the PMM confirmation was signed by the customer. (GX 573; GX 252A at 21,840-41). Subsequently, Schulz re-assigned the modules for these sales during the quarter ended October 31, 1971, telling PMM at the time that "the contract was not cancelled" and that deals were still alive but that the modules had been needed elsewhere—an admittedly false story originally necessitated by Schulz and David Stirling having explicitly analyzed in writing the method of avoiding the APB's disclosure requirements for prior period adjustments. (GX 923; Tr. 154346; 3385; 4828-30). His several later inconsistent statements about this explanation to PMM, given during the bankruptcy hearings (GX 381; Tr. 3381-2), during the discovery investigation in a shareholders' action against PMM (CtX 1A; Tr. 3372-81) and during his own Grand Jury appearance (GX 381; Tr. 3382-6) were the subject of extensive arguments and counter-arguments during summations as to whether or not they constituted evidence of a guilty consciousness. (Tr. 5643, 5787-99 and 5919-20). Since Schulz had, at no point, asked that this proof be stricken, or otherwise somehow withdrawn from the jury's consideration, his proposed "unanimity" instruction simply failed to encompass this direct evidence of his having totally embraced the central object of the scheme to defraud alleged in Count One wholly apart from those parts of the scheme specifically alleged. And, even though his later motion and charge had been enlarged to include the mail fraud scheme in Counts Three through Eight, here too, it simply failed to treat adequately the propriety of the jury considering this Virgin Island's proof, and, in addition, whether it needed to be unanimous in crediting all or part of the Virgin Islands' testimony of Kuveke (Tr. 1543-6), Davis (Tr. 1320-22), or Wood (Tr. 4828-30), accepting as true all or part of the facts established by the four Virgin Islands' exhibits (GX 252A, 568, 573 and 923), or accepting as true some or all of the thirteen pages of Schulz' Virgin Island admissions and contradictions (CtX 1A; Tr. 3372-85).

ently admissible as to the balance of the indictment, while seeking too much by requesting that the jury be advised that the Court had "withdrawn" portions of the charge. In any event, the proof was sufficient as to each specification under attack.

(a) Paragraphs 10-12

While it is true that Schulz was not shown to have any part in the original negotiations or execution of the Reseac or Kece transactions, he did insist upon receiving all auditors' "sales" inquiries, and the jury could have found that HKF's questions concerning Reseac in both 1969 and 1970 passed through him, if not, also the false answers in response. Thereafter, over the course of the next two years he received monthly reports on both of these receivables showing virtually a constant state of default. (GX 795, *passim*).^{*} By the beginning of 1971, Schulz had included a notation on the first edition of an internal checklist for Stirling and Yanowitch that both receivables were past due and needed to be brought current. (GX 627 at 64,991).

While Schulz was also not shown to have been informed of the Route 57-13 negotiations or the preparation and execution of the original contract, he was shown shortly thereafter to have participated in discussions with Mauriello as to the possible applicability of the SEC's nine circumstances set out in ASR No. 95. If he had then measured the three transactions against that release (as Kuveke did at the time for Route 57-31) none would come through entirely unscathed: Reseac and Route

^{*} Indeed, throughout this period, only a few invoices seem to have been prepared for Kece and Reseac and all were apparently forwarded to Yanowitch or the Stirlings instead of being mailed to the party in default. (GX 96; GX 795 at 90,536-52, 90,565-69, 90-572-4, 90,710-26).

57-31 each involved "non-interest-bearing" and Kece "non-recourse" receivables; all three had only a "small or no down payment"; and all three purchasers had evidenced some "financial weakness." (GX 580 at 99,076, 99,101). And, while the Route 57-31 contract was later amended to impose interest terms, this circumstance should have warned him that Homex was exercising some "effective control of the property". (GX 580 at 99,101). Finally, as to the interdicted "concurrent loans to purchasers" (GX 580 at 99,101), Schulz was shown to have represented in his July 9, 1971, letter to the SEC that none had occurred. (GX 55A p. 20). Passing any direct inquiry of the purchaser, an examination of Schulz' accounting department records would have shown the establishment of the \$100,000 demand deposit with the First National Bank of Rochester at the same time that its check, endorsed over to Homex by Route 57-31, had been received and that no activity in that checking account had occurred during the intervening six months. (GX 65-6 and 69).*

* In trying to find some unfairness in the manner in which the three land sales were actually presented to the jury by the trial court, Schulz is unfair to Judge Frankel. He completely misquotes the single sentence from the charge that he sets forth in his brief in support of his argument that he was inaccurately, so far as the land sales were concerned, "saddled with the defense of his co-defendants, namely, that 'at least many' of the eight witnesses had deliberately lied" (Sc.Br. 62). By improperly adding the bracketed editorial insertion "those accusations [¶¶ 10-12]" he changes what Judge Frankel actually said into something entirely different. The antecedent to "those accusations" was the whole preceding sentence: "On the particular charges in that paragraph 10, and on all the charges throughout the allegations of this indictment, the defendants flatly deny the accusations against them." (Tr. 5981). Thus, the referant in the following sentence for all of the defendants contending that "at least many of those witnesses must have testified falsely" was entirely accurate as to Schulz because his counsel had repeatedly argued exactly that as to

[Footnote continued on following page]

(b) Paragraph 14

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The allegations of Paragraph 14 uniformly charged the Greater Gulf transaction against all defendants, and only in Yanowitch's case, under subpart (d), was his responsibility specifically alleged to be direct and not vicarious. Schulz was shown to have personally engaged, in extended discussions with HKF during January and February 1971, about its refusal to permit income recognition on any project without certain audit evidential matter. (GX 634, *passim*). During that period, because of the unavailability of such evidence, he repeatedly directed Kesel to reassign the modules previously sold to Southbridge, Clay and other projects to Greater Gulf until it plugged a \$6,786,900 gap in sales for the first six months. One week later, on March 6, 1971, an additional \$1,129,600 of Greater Gulf "sales" were recognized on the Homex journal for the seven month period ending February 28, 1971; thus, \$7,916,500 out of total modular sales of \$12,492,770 were from this single project. (GX 359; GX 364B at 43,942). While the jury had no direct proof that Schulz was informed that the Greater Gulf contract had been signed in late February, 1971, and backdated into December, 1970, the inference that he knew of the backdating was firmly grounded in the accounting sales records, which demonstrated the non-existence of that contract until late February. (GX

several witnesses testifying about Schulz' role in other areas beyond the land transactions. (*E.g.*, Tr. 5772, 5807, 5813; cf. 5913). Indeed, even as to the land sales, Schulz' summation had accused Mauriello and Murray, two witnesses beyond the eight identified in his brief, of having unspecified "problems of credibility" (Tr. 5772) later related to at least one of the three land sales (Tr. 5779-80). Thus, Judge Frankel was entirely justified in refusing to modify his entirely accurate characterization of Schulz' contentions. (Tr. 6026-27).

364B). Furthermore, it was also permitted to consider the evidence of his knowledge of the backdating of the USShelter-Greater Gulf contract from March 17, 1971 into February, 1971, as charged in paragraph 15(b), as showing that he also knew the earlier related backdating of the main Greater Gulf contract. (GC 815 at 95,300).*

With regard to his knowledge of the forged character of the FHA commitment letter, the jury had before it Schulz' own memorandum of his having instructed Dienstag to withhold its existence from Brown Wood (GX 815 to 95,201 ¶ 6).** He also declined, on March 18, 1971, to supply PMM with the letter, in favor of Yanowitch's doing so on March 19, 1971, even though he previously had sent Mauriello a copy, later retrieved by Yanowitch. (*Supra* at 29). In sum, the jury had a sufficient basis for concluding that Schulz was fully knowledgeable with respect to the forged character of the letter.***

* Indeed, his booking of the Southbridge and Clay contracts the previous November, when viewed in light of his notation two months later to "obtain contracts" for these jobs, shows that Greater Gulf was just part of a pervasive practice of booking sales for a period and later obtaining signed contracts in support thereof. (GX 351, 352, 356, 627, 795, 833, 1647). His later false written statement to the SEC that such contracts always had been obtained before recognition of income adequately demonstrated to the jury the extent of his guilty knowledge in this respect. (GX 55A p. 6).

** In addition, the jury had learned that the previous year Schulz had participated with McKeon in forging several items supplied to HKF. (*Supra* at 20).

*** Finally, Mauriello's Greater Gulf accounting opinion sufficiently called to Schulz' attention the applicability of the SEC's ASR No. 95 to this transaction and, accordingly, the need to have disclosed the shell character of Greater Gulf. (GX 679 at 67,270). In addition, since Schulz was obligated to cause the disclosure of

[Footnote continued on following page]

(c) Paragraphs 15(b) and (c)

Paragraph 15(b) was premised on the recognition of \$300,000 of USShelter financing fee income during the seven months ended February 28, 1971 and upon a letter contract between it and Greater Gulf, dated February 15, 1971, but not executed until March 18, 1971, three weeks after the end of the period. (Tr. 5133-34). The proof showed that the letter was not even prepared and sent to Phillips in Mississippi until March 7, 1971, and that as late as March 17, 1971, Schulz himself was still writing memoranda to both of the Stirlings and Yanowitch in order to prod them to have Phillips obtain both the "signed U. S. Shelter financing fee letter from the Greater Gulf Coast contract" and the auditor's confirmation thereof. (GX 815 at 95,300; GX 226). Finally, when it came back from Mississippi, it had been signed as accepted by Greater Gulf "with attachments" which were dated on their face March 18, 1971. (GX 115B). In the absence of some testimony or other evidentiary basis for doing so, the jury was simply not required to assume that Schulz had been the recipient of several explanatory false representations because "too many red flags were flying to make these contentions plausible." *United States v. Frank*, 494 F.2d 145, 152 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *United States v. White*, 124 F.2d 181, 185 (2d Cir. 1941); *United States v. Benjamin*, *supra*, 863.

Paragraph 15(c) charged the improper capitalization of \$832,000 of general and administrative expenses

"the material facts pertinent to the possible existence of control" (17 CFR § 230.410) of Greater Gulf by Homex, he should have inquired before filing the registration statement on April 21, 1971. When, after receiving the SEC's letter of comment, it was amended on July 16, 1971, to describe Greater Gulf as "a non-affiliated customer" (GX 11 at 32 fn. (cc)), the statement became positively misleading.

thus overstating simultaneously income and assets. Schulz was the chief architect of this device, having conceived it while HKF was still engaged as Homex's auditors, which he originally sold to PMM as a receivable on the false basis that Mississippi "government authorities will reimburse the Company in the amount of \$832,000". (GX 809 at 90,946; GX 634 at 56,516 ¶ 4; GX 817 at 90,398 ¶ 9(b); GX 398). By March 8, 1971, Schulz had not obtained either funds or a written promise of them, but instead had merely "invoiced the trustee [of the proposed Mississippi industrial revenue bond issue] for these items", a fact which he apprehended as possibly presenting problems if discovered by the "underwriters attorneys" (GX 815 at 95,098 ¶ 7). When, on March 23, 1971, Phillips obtained from the Mississippi bank tentatively designated as trustee only a highly qualified confirmation (GX 867), Schulz switched the debit to the construction-in-progress sub-account of property, plant and equipment where it would remain for 18 months through bankruptcy while the proposed bond issue languished and died.

(d) Schulz' "Wilfulness"

As an overall matter, the jury was charged that it had to find that Schulz acted with "a specific intent to defraud in doing the acts required by the several counts." (Tr. 6011, 6036-37, 6039, 6060). This was clearly, as to at least the § 24 charges in Counts 1 and 2, if not Count 9 as well, a far more favorable charge than Schulz would otherwise have been entitled. *United States v. Benjamin, supra*, 862-63. The jury, in considering whether this was proven, was entitled to view the evidence as a whole. In so doing it gave weight to proof other than that alleged in paragraphs 10-12 and 15 (b-c), including his admittedly deliberate postponement of the \$500,000 cost overrun accounting entry out of 1970 in order to

boost Homex's profits for that year. Since, as to this, he had admitted to deliberately withholding this postponement information from Mauriello and HKF, his willingness to do the same thing with regard to the land and Greater Gulf transactions was apparent. (Tr. 2610). Indeed, as to the forgery involved in the latter transaction, since the jury had before it Schulz' having himself forged other audit evidential matters, it was entitled to find him the instigator of the Greater Gulf forgery. (GX 399A-B; GX 853 at 5807-13; Tr. 2503-4 and 3217-20). Finally, the jury had also learned that he was the kind of controller who maintained a double set of books for module assignments, only one of which was ever shown to PMM; here, although, the original request to charge had sought to remove this paragraph 13 from the jury's consideration, Schulz now concedes that it was proper for the jury to consider this proof and the reasonable inferences drawn from it. (ScApp. 138-40). Such behavior supplies the capstone of the proof which, to a moral certainty, showed that Schulz specifically intended to defraud Homex investors.

POINT II

The Trial Court Did Not Err In Permitting The Evidence Supporting Paragraph 16 of Count One of the Indictment To Be Heard and Considered by the Jury.

The Stirling brothers and Yanowitch contend that the District Court committed reversible error in denying their pre-trial motions to strike from the indictment paragraph 16 of Count One, which alleged that these three defendants had failed to disclose that seven members and officials of the United Brotherhood of Carpenters and Joiners of America had had substantial amounts of Homex stock bought for them at below market prices

and the same stock sold for them at above market prices. (SBr. at 35-38; YBr. at 42-45). The Stirlings and Yanowitch rest their claim of error on three grounds: violation of their privilege under the Fifth Amendment not to be compelled to give testimony against themselves in a criminal case; violation of the right of David Stirling, Jr. and Yanowitch not to be twice put in jeopardy for the same offense and the allegedly inflammatory and prejudicial nature of the charge contained in paragraph 16. All of these grounds for argument lack substance and the claim is without merit.

A. Defendants' Fifth Amendment privilege against compelled self-incrimination in a criminal case was not violated.

The Stirlings and Yanowitch claim that in disclosing to the SEC and the public the stock transactions which they had conducted for the union officials, they would have had to set out their own criminal violations of the Taft-Hartley Act, 29 U.S.C. § 186, and that the self-incrimination clause of the Fifth Amendment therefore bars their prosecution for the omission of this matter. They cite *Marchetti v. United States*, 390 U.S. 39 (1968), and its companion case, *Grosso v. United States*, 390 U.S. 62 (1968), in support of this proposition. Their reliance on *Marchetti* and *Grosso* is misplaced; indeed, their position would lead to the curious result that any securities misrepresentation would be constitutionally protected if the true facts were criminal.

The circumstances in which a person who fails to comply with a statute requiring the provision of information to an agency of the Government may rely on the Fifth Amendment privilege against self-incrimination have been carefully circumscribed to those situations in which the statute is aimed at a highly selective group

inherently suspect of criminal activities, such as the professional gamblers in *Marchetti*. A defense based on the privilege is not available when the statute violated is applicable to the public at large, the demand for information is neutral, and justified by acceptable reasons of policy unrelated to obtaining information against a highly suspect group. *California v. Byers*, 402 U.S. 424, 430-31 (1971) (failure to comply with self-reporting requirements of California hit and run statute); *United States v. Oliver*, 505 F.2d 301, 307-08 (7th Cir. 1974) (Stevens, J.) (failure to state on tax return income probably derived from narcotic trafficking). This Court has upheld a preliminary injunction requiring the notorious Sidney Stein to report all his securities transactions to the SEC and did so carefully following the *Byers* case and upon a finding that securities regulation is an essentially non-criminal and regulatory area of inquiry. *SEC v. Radio Hill Mines Co. Ltd.*, 479 F.2d 4, 7 (2d Cir. 1973).*

It is also the rule that a party wishing to assert the Fifth Amendment privilege must do so at the time at which he makes or fails to make a required statement. Failure to make a timely assertion of the privilege works as a waiver or negates the claim of Governmental compulsion necessary to bar later use of the information or omission assertedly protected by the privilege (except in certain strictly limited circumstances, such as custodial interrogation, that are not relevant here). *Garner v. United States*, 424 U.S. 648, 653-55 (1976); *United States v. Liguori*, 430 F.2d 842, 847-48 (2d Cir. 1970), *cert. denied*, 402 U.S. 948 (1971); *United States v. Oliver*, *supra*. Neither the Stirlings nor Yanowitch asserted the privilege they now claim at the time of filing the Merrill Lynch prospectus with the SEC or

* Prior to trial defendants did not raise this Fifth Amendment claim. This may well be because Yanowitch's counsel represented the defendant in the *Radio Hill Mines* case and was well aware that such an argument would be unavailing in this circuit.

during the course of the present trial. Even if the privilege were available to them, their assertion of it now comes too late to be recognized.

B. Neither David Stirling, Jr., nor Yanowitch has been put twice in jeopardy for the same offense.

David Stirling and Yanowitch were both indicted for violating the Taft-Hartley Act in the Western District of New York. Stirling pleaded guilty and Yanowitch *nolo contendere* to various counts of that indictment. (St-YApp. 51-75). They claim in this Court that the presentation to the jury of the facts that were the basis of the Taft-Hartley indictment is barred by the double jeopardy clause of the Fifth Amendment.

Prosecution is properly barred by a claim of double jeopardy only when the two offenses are in fact and law the same and where the same evidence is required to prove the two offenses; the double jeopardy clause does not bar prosecution of cases where the same evidence is simply presented as proof of two separate crimes. *E.g.*, *United States v. Cala*, 521 F.2d 605, 607 (2d Cir. 1975); *United States v. McCall*, 489 F.2d 359, 362 (2d Cir. 1973), *cert. denied*, 419 U.S. 849 (1974); *United States v. Jackson*, 482 F.2d 1167, 1176 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159 (1974). There can be no question that the proof required to establish the violations set out in this indictment—violations of the securities laws, and the mail fraud statute and conspiracy to violate those and other statutes—in each instance requires proof of essential elements of the crime that were in no way required to show violation of the Taft-Hartley Act, which requires that no employer “pay, lend or deliver . . . any money or other thing of value to any representative of his employees who are employed in an industry affecting commerce.” 29 U.S.C. § 186(a) (1).

Here the purchase and sale of stock for union leaders were charged as an instance in a fraud scheme that violated the securities and mail fraud laws. The parallel in more typical claims of double jeopardy is to the charging of a substantive crime as an overt act in a conspiracy count when the defendant is or has been charged with the substantive crime. It is no basis for a valid claim of double jeopardy that the government proves the substantive crime in proving the conspiracy since the evidence required to be proved for each crime is different. *Pinkerton v. United States*, 328 U.S. 624, 644 (1946); *United States v. Williams*, 385 F.Supp. 897 (N.D. Ind. 1974), *aff'd*, 529 F.2d 529 (7th Cir. 1976); *United States v. Marshall*, 513 F.2d 274 (5th Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976); *United States v. Campisi*, 248 F.2d 102, 107 (2d Cir.), *cert. denied*, 355 U.S. 892 (1957). Thus it is immaterial that violations of the Taft-Hartley Act may have been proved in the course of establishing the basis for conviction of other crimes requiring different evidence for proof of their essential elements.

Equally importantly, the claim of double jeopardy as to David Stirling, Jr. and Yanowitch comes too late. In moving to strike Paragraph 16 of Count One of the indictment prior to trial, both defendants expressly stated that they did not claim double jeopardy. (St-Y App. 31 ¶ 22). This alone effectively bars them from asserting this basis for their claim that Judge Frankel erred in ruling against them prior to trial since they specifically stated that they did not make this claim. Even constitutional claims not raised in the District Court are barred from consideration on appeal. *United States v. Braunig*, Dkt. No. 76-1448, slip op. 2773, 2779 (2d Cir., April 11, 1977); *United States v. Housand*, 550 F.2d 818, 825 (2d Cir. 1977). Further, no motion on

double jeopardy grounds was made before or during the trial. The claim of double jeopardy is a personal one and it is waived when a defendant fails to raise it before or at trial. *Grogan v. United States*, 394 F.2d 287, 289 (5th Cir. 1967), *cert. denied*, 393 U.S. 830 (1968); *Ferina v. United States*, 340 F.2d 837 (8th Cir.), *cert. denied*, 381 U.S. 902 (1965); *Barker v. Ohio*, 328 F.2d 582 (6th Cir. 1964); *Morlan v. United States*, 230 F.2d 30 (10th Cir. 1956).

C. The District Court's refusal to strike paragraph 16 as irrelevant, inflammatory and prejudicial was proper.

1. Paragraph 16 was properly not stricken before trial as surplusage of an inflammatory and prejudicial nature.

Prior to trial, the Stirlings and Yanowitch moved under Rule 7(d), Fed.R.Crim.P., to strike paragraph 16 of Count One as inflammatory and prejudicial surplusage. Judge Frankel granted their motion to the extent of substituting in paragraph 16 the verb "had" for "been paid off by having" in the phrase "seven members and officials of the United Brotherhood of Carpenters and Joiners of America had been paid off by having approximately \$240,000 worth of Homex common stock purchased for them" (10/1/76 Tr. at 69). The implication of bribery was thus removed from the language of the indictment as it went to the jury. The defendants were entitled to no greater relief.

* For some reason, defendants fail to note this change in the indictment language when they set out paragraph 16 in their briefs. SBr. at 36; YBr. at 42-43.

Rule 7(d) allows the District Court to strike surplusage from an indictment. It is the general rule that in order to have language stricken from the indictment, it must not only be unnecessary or irrelevant to the charge but must also be of a nature to inflame and prejudice the jury. *E.g.*, *United States v. Bonanno*, 177 F. Supp. 106, 116 (S.D.N.Y. 1959), *rev'd on other grounds*, 285 F.2d 408 (2d Cir. 1960); *United States v. Klein*, 124 F. Supp. 476, 479 (S.D.N.Y. 1954), *cert. denied*, 355 U.S. 924 (1958); *United States v. Archer*, 355 F. Supp. 981, 989 (S.D.N.Y. 1972), *rev'd on other grounds*, 486 F.2d 670 (2d Cir. 1973); *Dranow v. United States*, 307 F.2d 545, 558 (8th Cir. 1962). Defendants fail to make either showing. While it would have been possible for the Government to write paragraph 16 in a plainly prejudicial manner by, for instance, including in it the history of the conviction, and sentence of David Stirling, Jr. and Yanowitch, *see United States v. Verra*, 203 F. Supp. 87 (S.D.N.Y. 1962), paragraph 16 is simply not of that nature. Particularly as redacted by order of Judge Frankel, it describes the stock transactions between the defendants and labor leaders in the blandest possible terms, simply identifying the recipients of the stock and setting out the circumstances of the financial advantage given the union officers by the stock transactions. The innocuousness of the language is further underscored by comparison to paragraph 14, about which no complaint is made; that paragraph accused all defendants of perpetrating their fraud by dealing in forged letters. Thus, no serious claim can be made that paragraph 16 is rhetorically inflammatory. *See United States v. Dioguardi*, 332 F. Supp. 7, 23 (S.D.N.Y. 1971).

The defendants make an unfocused attempt to claim that paragraph 16 was irrelevant surplusage to the charges against them. Claims of irrelevant, inflammatory and prejudicial charges in an indictment are, of

course, at one remove from charges that particular evidence is so unfairly prejudicial that, although relevant, it should be barred from jury consideration under Rule 403, Fed.R.Evid. Rule 7(d) is not a rule of evidence but one of pleading. Thus, at bottom, the claim here is that a charge against corporate executives that they gave common stock to union representatives below market price it bought back above market price is of such that regardless of the proof offered by the government as to the circumstances—be it extortion, bribery, friendship or whatever—it can form no part of an indictment for violating the securities laws or mail fraud statute.* This is a truly remarkable proposition, and not surprisingly the defendants cite no case law to support their position. Indeed, in light of the obvious importance of unions to most industrial corporations and to construction companies in particular—a point emphasized by the inclusion of virtually a full page of material on labor relations in both of Homex's registration statements—the relevance is obvious.** The District Court did not abuse its discretion in permitting the issue of labor relations to be presented at trial. *United States v. Courtney*, 257 F.2d 944, 945 (2d Cir. 1958),

* This posture of the argument reflects the posture the defendants adopted at trial where they did not object to the admission of the evidence supporting this paragraph of the indictment.

** Judge Frankel properly answered this broad proposition with a pungent hypothetical:

"If one way [corporate executives] got satisfactory relations was by killing a union leader, I would allow the government to allege that and let a jury decide whether a company could ever file an honest registration statement about labor relations without disclosing that. Maybe a company would never be able to float a public issue if it bribes union officials or kills them, and that would be too bad, but I don't think you are entitled to have that kind of allegation struck out of the indictment as a matter of law." (Tr. 10/1/76 at 63).

cert. denied, 358 U.S. 929 (1959); *Dranow v. United States*, *supra*; *United States v. Klein*, *supra*.

2. There were no grounds to strike paragraph 16 during or at the close of trial.

Despite their claim that the District Court erred in not granting their Rule 7(d) motion prior to trial, the defendants implicitly suggest that the district judge should have *sua sponte* stricken paragraph 16 in the course or at the end of trial by arguing that the factual charge of the paragraph "could never have been proven, in fact never was proven." (SBr. at 35, YBr. at 42). This is a hollow claim.

As pointed out in the statement of facts, the Government presented at least ten witnesses who testified to one or another aspect of the labor stock transactions. See pp. 5-7, 14-19, 24-25, 45-47, *supra*. In contrast, Yanowitch testified at length on direct examination, but offered no account of his labor dealings; David Stirling discussed the labor transactions only in generalities. Both men, of course, had pleaded in the Western District of New York to knowingly giving things of value to members and representatives of the carpenters union. Most pointedly, while one or another of the defendants made motions at the close of trial or requests to charge, or both, to withdraw every other specified means of fraud from the consideration of the jury on the grounds that there was insufficient evidence to support it, no one moved to withdraw paragraph 16, knowing full well that the Government had made its case on this issue. No sound argument can be made that paragraph 16 is surplusage in the sense that it was not or could not be proven.*

* The defendants wisely do not make a claim on this appeal that the facts alleged and proved with respect to paragraph 16 were in fact immaterial to the prudent investor, noting only

[Footnote continued on following page]

in passing—and totally without argument or citation—that they are “putting aside the patent lack of materiality”, St.Br. 36; YBr. 43, and (somewhat inconsistently) that the facts were of “dubious materiality.” St.Br. 38; YBr. 45. First, this was simply not their defense at trial. Far from contesting the materiality of the labor relations, David Stirling contended that the transactions never took place (*supra* at 45-47) (a defense joined by William Stirling in summation), and Yanowitch chose never to mention the labor issues during his examination (which, under the trial court’s ruling, precluded cross-examination on the issue). Even more significantly, at the close of the Government’s case the defendants moved to withdraw every other specified means of fraud from jury consideration, under the principles of *United States v. Natelli*, *supra*, except paragraph 16, thus waiving the issue on appeal. *United States v. Natelli*, *supra*, 527 F.2d at 327; *United States v. Mascuch*, 111 F.2d 602, 603 (2d Cir.), *cert. denied*, 311 U.S. 650 (1940); *United States v. Goldstein*, 168 F.2d 666, 671 (2d Cir. 1948).

Finally, of course, the facts were material, as the jury found (on instructions about which no claim of error is made). The significance of harmonious labor relations was repeatedly and dramatically emphasized to investors. Clearly, the true basis for those relations would be a matter of concern to them—a fact the defendants must have known, since their own in-house counsel concluded that the facts, if known, would seriously damage Homex’s good image. (Tr. 2822). The bribery of union officials to the benefit of a corporation has been recognized as part of a security fraud scheme, *United States v. Bruce*, 488 F.2d 1224, 1228 (5th Cir. 1973), *cert. denied*, 419 U.S. 825 (1974); *Cf. In re Central Speciality Co.*, 10 S.E.C. 1094 (1942); indeed, the materiality of the conduct demonstrated here followed *a fortiori* from cases finding material facts affecting the integrity of management in the conduct of the corporation’s business. See, e.g., *Cooke v. Teleprompter Corp.*, 334 F. Supp. 467 (S.D.N.Y. 1971); *United States v. Pope*, 189 F. Supp. 12, 22 (S.D.N.Y. 1960); *In re Franchard Corp.*, 42 SEC 163 (1964). This is particularly so where a corporation doing business in New York makes unauthorized loans. *Miller v. American Telephone and Telegraph*, 507 F.2d 759, 762 (3d Cir. 1974) and cases cited therein; N.Y. Bus. Corp. Law §§ 714, 719, 1317, 1320; see *United States v. Dixon*, 536 F.2d 1388, 1402 (2d Cir. 1976) (Lumbard concurring).

POINT III**William Stirling's Motions For Judgment Of Acquittal Were Properly Denied, And The Prosecutor's Summation Was Proper.****A. The evidence against William G. Stirling was more than sufficient to sustain his conviction.**

William Stirling contends that the evidence in this case shows no more than that he was "the head of production at Homex, a craftsman whose talent ran to assembling prefabricated homes with cranes". StBr. 53. On this basis he argues that the district judge erred in refusing to grant his motion for a judgment of acquittal. This argument misstates the facts and is without merit.

William Stirling must first be seen in the context of his responsibilities at Homex. He was President of the company, chief operating officer, and a director. He sat on the finance committee and the executive committee of the corporation and his frequent attendance at the meetings of those committees shows his active leadership in the affairs of the business. (GX 594-95, 798-801). He had direct responsibility for areas particularly sensitive to the financial community. The dissemination of corporate news was strictly controlled so that releases could not be disseminated without his initialled approval. (Tr. 2807). The annual and quarterly reports needed his approval, and he worked diligently at the review and production of the annual report. (Tr. 2748, 2769-80; GXs 684, 166 at 51758, 697, 683, 687-90, 692-93, 695). Indeed, his direct involvement in the information made public through the annual report passed far beyond matters that would only be of concern to craftsmen. The first edition of the 1971 Annual Report contained a footnote to the financial statements reporting an income tax receivable of \$3,800,000 resulting from a deferral of the current year's

sales for tax purposes. (GX 683). The deferral was sufficient to produce a tax net operating loss which eliminated the company's taxable income for both fiscal 1969 and 1970. It was decided that this patent indication of Homex's financial weakness should not reach the public, and it was William Stirling who set about collecting each and every copy of the revelatory document, including the original usually kept by the printer. (Tr. 2772-75). The final version of the report done under William Stirling's careful supervision masked the company's true financial posture and included a lesser tax claim in order not to reveal the company's actual rate of sale and collection on its modules.

The trial proof showed that William Stirling primarily participated in three principal areas of the Homex fraud: the land sales, the Mississippi contract, and the labor stock deals. There was ample evidence of his involvement in each. The Kece land sale was one in which William and David Stirling were on both sides of the transaction since Homex's subsidiary, Hollyrood Park II, Inc. optioned the land to Peter Thun, the general partner in Hollyrood Park Associates in which the Stirlings were limited partners, and that partnership was to obtain the Kece land if a proper package for the purchase of 330 units could be worked out. (*supra* at 9-10). William Stirling approved the misrepresentation of the option on the Homex books, signing the Hollyrood Park II minutes which described the transaction as a sale. (GX 93D at 653-54). When the Kece receivable went into default, making the option nature of the transaction plain, William Stirling joined his brother in making the necessary payments to Homex through the ruse of selling to Thun their interest in an unrelated corporation for \$95,000 which provided Thun with the funds to pay off several of the Homex receivables including Kece. (GX 91 and 95D; Tr. 2217-23).

William Stirling's relinquishment of his interest in these properties was clearly directed at producing an appearance on Homex's books of reliable receivables; in fact, there was in the minds of the parties, no receivable at all.*

Just as William Stirling had met with the officers of Pressprich in relation to the first public offering (Tr. 290, 324), so he was also closely engaged in the work on the second offering. He joined in the distribution of, and the consequent discussions which were held on the basis of, the puffed first quarter earnings in the fall of 1970. (GX 593-95). After the selection of Merrill Lynch as the underwriter, he was active not only in meeting with them on numerous occasions, but also in controlling the flow of information available to them and their counsel. (GX 403, 806-07).

William Stirling was further in general charge of the release of news—or the failure to release news—on the Greater Gulf Coast “sales” that were crucial to the success of the second offering. (Tr. 2749-50). Not surprisingly, it was William Stirling's policy in connection to the Mississippi scheme to put the constant emphasis on items such as pictures of trains moving modules to Mississippi and to bury or omit entirely financial information such as the gigantic \$100 million backlog which had been created through the “contract” between Homex and the Greater Gulf Coast Housing Development Corporation. (Tr. 2765-68; GX 166).

* When Kece was in default once more in March 1971, William Stirling joined with his brother again in paying the debt through Thun. The Stirlings “sold” their interest in Hollywood Park Associates to Thun in return for, among other things, his payment of Kece arrearages and his signature on the Kece confirmation to PMM. (GX 82, 86, 70B; Tr. 3132-37, 3144).

In relation to the labor stock transactions, William Stirling directly approached Ruggiano and urged him to buy the stock in Homex. William Stirling further joined in overcoming Ruggiano's hesitation as to the legality of the transaction, telling him that "it was perfectly legal." (Tr. 581-82). He also joined in submitting the false travel expense vouchers used to pay the interest on the purchase loans at the Central Trust Co. His signed voucher was the most transparent in displaying knowledge of what the money was to be used for; the entries were for "Travel and Ent[ertainment] of Union Rep[resentative]s relative to new contracts," "Travel and Ent[ertainment], & Meals relative to representation of union locals," and "Meeting with National Union Representatives." (GX 319).*

William Stirling betrayed his guilty knowledge of the import of his past behavior by actively joining in the cover-up of the crime. He joined his brother and Yanowitch in purging the files of the executive offices of Homex immediately before his final departure in July 1972. (Tr. 2297-302). He was present at the meeting with his brother, Yanowitch and Schulz, who had traveled up from Lancaster, Pennsylvania for the occasion, when McCann was summoned to turn over his copies of the documents spelling out the obtaining of the cash to pay off the labor union leaders' loans at the Central Trust Co. (Tr. 211-12). It was in the car of William Stirling's wife that McCann was sent out of the jurisdiction to escape a subpoena from the trustee in bankruptcy. (Tr. 217).

* William Stirling was equally involved in the buying out of the union leaders' stock at above market prices through the device of William Shea's purchase of some stock and his take-over of the Central Trust loan. He personally signed the letters to Shea promising to indemnify him for the purchase of stock from two union officials, Livingston and Campbell. (GX 290, 295).

These facts provided ample evidence to establish William Stirling's participation in the fraud schemes and conspiracy. As a general matter, this Court has noted that once a conspiratorial agreement has been demonstrated—as it clearly was here—the Government need only show slight additional evidence to connect a particular defendant to it. *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974). His ownership of a controlling block of Homex stock and his sizable corporate salary provided ample motive for his actions. Indeed, this Court has found sufficient evidence to support a verdict merely from the inferences properly drawn from the participation of an executive in a company demonstrated to have been involved in fraudulent activities coupled with direct evidence far less persuasive than that shown here. *United States v. Hanlon*, 548 F.2d 1096, 1100 (2d Cir. 1977);* see also *United States v. Erb*, 543 F.2d 438, 446 (2d Cir.), *cert. denied*, 97 S. Ct. 493 (1976).**

* In *Hanlon*, this Court noted "There was evidence that Katritsis was a confidant of Amanatides [a co-schemer not on trial] and did his 'personal' typing, despite his limitation to a 'hunt and peck' technique. It was reasonable for the jury to infer knowledge of Amanatides' criminal scheme from this." 548 F.2d at 1100.

** The defense case—which this Court may properly consider in reviewing the sufficiency of the evidence, *United States v. Mariani*, 539 F.2d 915, 917 (2d Cir. 1976); *United States v. Singleton*, 532 F.2d 199, 204 (2d Cir. 1976), further strengthened the Government's proof against William Stirling. David Stirling's testimony as to his own responsibilities and actions in relation to the company were constantly phrased in the first person plural which David defined to include his brother William and from time to time his deceased father. (Tr. 3388, 3392, 3986-4091, *passim*). Typically, David testified that he and William concentrated on the design, manufacture and installation aspects of

[Footnote continued on following page]

B. The prosecutor's summation was proper.

William Stirling makes three claims of prejudicial misconduct in the prosecutor's summation on his case: an alleged misstatement of the testimony of witnesses David Clayton and Samuel Ruggiano and the improper raising of a question as to the Stirlings' use of their Homex expense accounts. No objection was made by defense counsel to any of these remarks at trial and Stirling's conviction is therefore reversible only if the prosecutorial statements were plain error. *United States v. Ong*, 541 F.2d 331, 342-43 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 814 (1977); *United States v. Head*, 546 F.2d 6, 8 (2d Cir. 1976); *United States v. Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied, sub nom. Benigno v. United States*, 423 U.S. 1059 (1976); *United States v. D'Anna*, 450 F.2d 1202, 1206 (2d Cir. 1971); *United States v. Webb*, 463 F.2d 1324 (5th Cir.), *cert. denied*, 409 U.S. 986 (1972); see *United States v. Guglielmini*, 384 F.2d 602 (2d Cir. 1967), *cert. denied*, 400 U.S. 820 (1970).*

In fact, each challenged prosecutorial comment was fair. Stirling's counsel began his summation by reference to a promotional Homex film which was shown to the jury, "It Can Be Done". (Tr. 5656). He argued to

Homex's work (Tr. 3986-87, 4041); that he and his brother acted jointly in selling off Homex shares after the Merrill Lynch offering (Tr. 4032-33); and that the removal of papers from their offices was solely of personal items. Tr. 4050-51. David concluded his direct testimony by asserting that neither he nor William had violated or conspired to violate the securities laws. (Tr. 4091). Once the jury had found on the basis of independent evidence that William Stirling was a member of a scheme or conspiracy to defraud, his brother had provided ample basis for the jury to conclude that William had joined with David in every other means of fraud alleged in the indictment.

* In addition to constituting a jurisdictional bar, the failure to object emphasized the innocuous nature of the statements. *United States v. Canniff, supra*, 521 F.2d at 572.

the jury that the film demonstrated that Homex was a live company making a socially-needed product and thus utterly unlike stock frauds where the deceiver has no product at all. (Tr. 5655-56). The prosecutor responded to this characterization of the movie by pointing out to the jury what was omitted from the film—the fraudulent transactions which were misrepresented in the corporation's financial statements, namely, the Mississippi contract and the land sales. Attention was also drawn to further testimony. David Clayton's testimony of numerous meetings which the Stirling brothers had, not only with sales people, but also with "bankers, analysts, underwriters representatives", that these people visited the Avon plant and that the film was frequently shown to visitors. (Tr. 3659-61). It was established that the film was only made with the approval of William Stirling. (Tr. 2748-49).

It was thus fair comment in the context of discussing William Stirling's control over the dissemination of news from Homex and the representations made to the financial community and the investing public to point out to the jury the omissions from Homex's movie. Of course, the Government never contended that the movie was a registration statement. (StBr. 55). The remarks on the film were made in describing William Stirling's control over Homex's news and how he used that position to further the object of the conspiracy and fraud scheme.

Samuel Ruggiano had said that William Stirling had spoken to him about the Homex stock telling him that "it was going to be a good thing and go up and stuff like that, and I ought to go buy in." (Tr. 581). Ruggiano further reported that he had doubts as to whether such a purchase would be legal. William Stirling and his brother settled that question by reporting back to Ruggiano that the deal would be "perfectly legal" (Tr. 582)—which, of course, it was not.

Stirling quotes the prosecutor's characterization of his action as "urging" the stock on Ruggiano and labels that a blatant misquotation. StBr. 56, 25-26. The description of Stirling's activity was fair. It is plain from this testimony that Ruggiano did not jump at the first puffing discussion of the stock, but had to be persuaded that his scruples as to the legality of the transaction were without foundation. The assurance that the stock would go up, the advice to buy in, and the representation of the legality of the purchase based on the advice of counsel obviously amounted to urging or pushing Ruggiano to the purchase of Homex shares. To say anything less would be to misread the clear thrust of Ruggiano's testimony.

Finally, Stirling takes issue, out of context, with the prosecutor's statement that it was an open question as to how much had been taken out of the firm by the Stirlings through their expense accounts. This statement was made following explicit reference to a Homex memorandum which pointed out that the three senior members of the Homex management were drawing well in excess of their salaries in the fall of 1971. (GX 856). This reference to the documentary evidence was fair rebuttal to a theme (raised repeatedly in the direct examination of David Stirling), that the Stirling brothers were content with the money they had and were not looking for more and thus the jury could not ascribe any motive of avarice or self-enrichment to their actions. (*E.g.*, Tr. 3999, 4028, 4032-34, 4087-90). In response, the government properly pointed out that exhibits admitted at trial showed that the Stirlings were taking out of the corporation a great deal of money in excess of the salaries stated in their contracts whether through expense accounts or other devices.

POINT IV**The District Court Did Not Err In Denying Phillips' Motion For Severance.**

Phillips claims that the trial judge committed reversible error in refusing to grant his motion for severance. PBr. 5-13. Phillips' claim is essentially that the indictment presented multiple conspiracies of which he was involved in only one (which he characterizes as the "Mississippi transaction"), and that he was thus entitled to be severed from the trial of the other defendants. (PBr. 7-8). This argument is without merit.*

* Phillips failed to make any motion for severance prior to trial, see *United States v. Payden*, 536 F.2d 541, 543 (2d Cir. 1976), and now states that this was done on the Government's representation that the proof against him at trial would go beyond his involvement in the Greater Gulf Coast transaction. Phillips further contends that the Government failed to live up to its representation and that the trial judge's investment of time in the case when the Government rested was such that he was understandably led into the error of refusing to grant the severance. PBr. 5.

This account suffers from the serious omission of a motion from Phillips in the course of the trial which succeeded in obtaining a ruling from Judge Frankel barring the presentation of additional evidence against Phillips. The bill of particulars charged Phillips with making payments to public officials in order to influence their official actions. (St-YApp. 107). The Government further briefed this point before trial in response to a motion by Phillips to exclude Government evidence. In the course of the trial, Phillips raised this point after the case had been in progress for two weeks, and succeeded in inducing Judge Frankel to rule out all of the political payments and influence buying. (Tr. 770-86). Having succeeded in thus keeping from the jury further proof against him, Phillips cannot now argue that the Government failed to live up to its pre-trial representation or that the judge was misled in allowing the trial to begin on the basis of the Government's representation.

Phillips' concoction of six conspiracies out of the indictment borders on the bizarre. The unifying theme of all the alleged means of fraud is set out in the paragraph alleging the object of the conspiracy: the fraudulent inflating of Homex's earnings and the failure to disclose information adverse to Homex. Furthermore, there was a "consistency of personnel, method and type of operation," *United States v Hinton*, 543 F.2d 1002, 1014 (2d Cir. 1976), characteristic of a single conspiracy.* In the course of denying Phillips' mid-trial motion for a severance, Judge Frankel had no trouble in obtaining from Phillips' counsel the concession that if the jury believed the evidence against Phillips it would find him guilty of the object of the conspiracy:

"The Court: If the jury believes the testimony about the commitment letter, what else could that have been in pursuance of and why else would somebody forge such a letter, except to mislead people about the state of the business and the earnings or expected earnings of this company?"

"Mr. Mukasey: No doubt." (Tr. 3363).**

* Moreover, Phillips is forced to admit the unified nature of the scheme by attaching to his description of the land sales and the labor union stock deals which make up three of his six conspiracies that it was part of each of the conspiracies to issue annual reports and registration statements. Of course, the annual reports and registration statements are single publications covering all aspects of corporate activity—there are simply no separate annual reports on labor, on the sale of two plots of land, on the sale of a third plot of land and on "Mississippi transactions".

** The insubstantiality of Phillips' position is underscored by his failure to request from the District Court any jury instruction on the finding of multiple conspiracies or to object to the charge as given, despite the fact that the issue of single or multiple conspiracies is primarily one for the jury. *United States v. Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), *cert. denied*,

[Footnote continued on following page]

Phillips falls back to the argument that he was prejudiced by being tried with his fellow defendants. This overlooks the fact that Phillips was not engaged in some tangential or minimal aspect of the fraud; he was at the center of the largest misrepresentation. The evidence showed that he participated in forging a \$15,000,000 commitment letter from the Farmers Home Administration to the Greater Gulf Coast Housing Development Corporation, which was repeatedly used to write millions of dollars of earnings onto Homex's books; that he obtained the backdated letter that allowed U.S. Shelter to claim \$300,000 of earnings; that he repeatedly devised and procured confirmations of these transactions which defrauded Homex's auditors; and that he was active in suborning perjury as well as himself lying before the Securities and Exchange Commission and the grand jury in the Southern District of New York. His lesser corporate responsibilities and stockholdings pale beside this record of unswerving loyalty to the conspiracy and its

425 U.S. 960 (1976); *United States v. Arnedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3601 (March 7, 1977); *United States v. Crosby*, 294 F.2d 928, 945 (2d Cir.), *cert. denied*, 368 U.S. 984 (1962). The charge as given was eminently fair to Phillips, carefully instructing the jury that guilt is individual; indeed this was done not only in a general instruction, but also the jury's attention was repeatedly focused on the fact that Phillips was not named in various counts of the indictment. (Tr. 5978, 5980, 5984, 5986-89). In relation to Count Two this admonition was repeated to prevent any conviction not founded on those omissions and false statements with which Phillips was charged. (Tr. 6033-34). Although Phillips continues to cite *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966), as support for his position, he fails to point out to the Court that the reversal there flowed from the failure of the district court to give just the sort of focused individualized instruction to the jury which Judge Frankel provided here. *Id.* at 757. See generally *United States v. Bernstein*, 3 F.2d 775, 793 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 523 (1977).

ends.* There is simply no realistic possibility that the similar misbehavior of his codefendants such as Yanowitch—or even Yanowitch's attorney—could spill over to affect one who was himself so stained by the testimony against him at trial.

There is no basis in the record of this case to conclude that the indictment encompasses multiple rather than a single conspiracy, and that the jury could not find such a single conspiracy demonstrated. See *United States v. Finkelstein*, *supra*, 526 F.2d at 522-23; *United States v. Projansky*, 465 F.2d 123, 135 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972). But should the Court hold that there were multiple conspiracies, that variance is harmless error since Phillips can show no practical prejudice resulting from his joinder with the other defendants at trial. *United States v. Miley*, 513 F.2d 1191, 1207-09 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); *United States v. Ricco*, 549 F.2d 264, 270 (2d Cir. 1977); *United States v. Toliver*, 541 F.2d 958, 962-63 (2d Cir. 1976); *United States v. Lam Lek Chong*, 544 F.2d 58, 66 (2d Cir. 1976); *United States v. Sir Kue Chin*, 534 F.2d 1032, 1035 (2d Cir. 1976); see generally *Berger v. United States*, 295 U.S. 78, 82 (1935); *United States v. Calabro*, 467 F.2d 973, 983 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).**

* The emphasis Phillips now places on his state of mind is frivolous, for there can be little question that those who engage in forging Government letters, suborning perjury and perjuring themselves at the SEC have the requisite mental intent to be held guilty of the criminal acts charged here.

** As this Court has recently noted in *United States v. Variano*, 550 F.2d 1330, 1334 (2d Cir. 1977), defendants tried together on a conspiracy count are not entitled to a severance when, during trial, insufficient evidence proving that conspiracy is adduced unless the record demonstrates bad faith on the part of the Government. That holding *a fortiori* refutes Phillips' claim since the proof underlying the conspiracy charges is conceded to be sufficient, and he does not even claim that the Government acted in bad faith.

POINT V**Rule 11(e) Does Not Apply To Schulz' Statements, and the District Court Properly Denied the Motions to Suppress.**

Schulz argues that the District Court erred in declining to suppress certain factual portions of his grand jury testimony, later read to the trial jury, on the ground that they "were statements made in connection with, and relevant to" his "offer to plead guilty" to a crime (Rule 11(e)(6), Fed. R. Crim. P.). The argument is incorrect and should be rejected.

A. The pre-trial motion to suppress.

Schulz originally sought pre-trial suppression of all of his statements "to the Government and the Grand Jury from April 1976 through August 1976." (ScApp. 8). Since he had been making statements to the Government and several of its agencies for an extended period before this, his papers sought, as they do here, to attribute to the sessions before April 1, 1976, "completely different purposes" from those afterwards. (ScBr. 30; ScApp. 10-11). Before that date, during his oral interview sessions with the U.S. Attorney's Office, he claims to have answered all historical questions with an overall purpose of assuring "the prosecutor that there were no grounds for indicting him." (ScBr. 30).^{*} However, in doing so, he

^{*} The real reason for arbitrarily limiting his motion to the five month period was an attempt to avoid judicial focus on the consequences of his clear understanding before these interviews began, memorialized in writing by an exchange of letters between his counsel and the Assistant United States Attorney, that everything he said during the upcoming series of interviews could be used against him later. (ScApp. App. 27-32, 40-41).

denied recalling several "seemingly unforgettable facts" (ScApp. 29), such as, for one example, his own role in forging signatures on Homex accounting records, which quickly led him into the next stage where his claimed purpose was "plea bargaining". (ScBr. 30). A familiar pattern followed: initial requests for total immunity yielding to offers to plead to misdemeanors; next, offers to plead to felonies if probation were assured; then conspiracies if only the sentencing judge could be agreed upon, or if not that, then at least an agreement to limit the scope of the conspiracy charge and the attendant factual allocation which he would hear; finally, when all such suggestions had been rejected as improper under "the long-standing policy of the Southern District," *United States v. Werker*, 535 F.2d 198, 200 (2d Cir. 1976), *cert. denied sub nom. Santos-Figueroa v. United States*, 45 U.S.L.W. 3330 (Nov. 1, 1976), Schulz agreed to the terms of the written agreement uniformly employed in the Southern District wherein the cooperating witness agrees, in consideration of the extension of specified immunities, to plead guilty to limited charges, to provide truthful information in the future, to refrain from committing any further crimes, and that upon a violation of any of its terms "the information provided . . . many thereafter be used against him." (ScApp. 124, 46 and 6). On July 15, 1976, the eve of his scheduled grand jury appearance, Schulz said he agreed to be bound by these terms. (ScApp. 108-09). The following morning, Schulz appeared before the grand jury and answered several questions, as he later told Judge Frankel under oath, feeling that he was "in effect lying to the grand jury" in order to get a lighter sentence. (ScApp. 54-5 and 114).^{*} As to the remaining factual responses thereafter given, he suggested, during a telephone call to one of the Assistant U.S. Attorneys advising the grand jury

^{*} In point of fact, these admissions, when measured against the trial record of previous false statements, were wholly truthful.

that some might have been erroneous, but refused to specify which ones. Subsequently, after the indictment was filed, Schulz said that he had decided not to plead guilty to any of the counts because of his twofold disappointment (1) that the auditors had not been indicted and (2) the scope of the conspiracy count as to him was broader than he had hoped. (Sc.App. 123; Tr. 2033).

In the motion to suppress which followed, Schulz sought to prohibit the use of not only his verbal and written offers and promises to plead guilty, but all of the numerous factual responses given during the same time span—most often at the same meetings following or interspersed with efforts to exhaust the plea possibilities. (E.g., Sc.App. 34). Indeed, the motion even encompassed his own handwritten note as to a number of independent discrete factual matters, addressed to and read to the grand jury but prepared “a couple of days” before, wholly in private, without the slightest governmental knowledge or instigation. (Sc.App. 55 and 90; Tr. 5794; GX 906 for Id.).* In short, the motion covered everything within the five month period even if the factual assertion was a mere repetition of something said upon an earlier occasion.

In reply, the Government traced the legislative history of F. R. Crim. P. 11(e)(6), which was clearly addressed to the entirely different issues involved in rendering inadmissible both the subsequently withdrawn plea

* One paragraph of this writing was read to the trial jury. (Tr. 3385). The only other admission in the balance of the grand jury testimony that was actually read to the trial jury (Tr. 2606-10) was one which Schulz had made during the initial round of interviews in January and February 1976, and which thereafter served as the continuing basis of his offers to plead guilty. (App. 104; Tr. 2014). Thus, even if the motion to suppress the grand jury transcript had been granted, the government could have proven both of these facts by different untainted means.

itself (thus codifying *Kercheval v. United States*, 274 U.S. 220 (1927), as well as offers to plead guilty (overruling *United States v. Picarelli*, 148 F.2d 997, 998 (2d Cir.), cert. denied, 326 U.S. 722 (1945)). (See *Senate Hearings on H.R. 5463 before the Committee on the Judiciary*, p. 143 (June 4, 1974)). In addition, the Government directed Judge Frankel to Judge Weinstein's report that "none of the draftsmen" on the Advisory Committee intended the "radical effect" that would result if Schulz' proposed interpretation of the Rule were to prevail. 2 *Weinstein's Evidence*, ¶ 410[07], pp. 410-40 to 410-41 (1975); Government's Brief in Opposition, pp. 5-6.*

Judge Frankel denied the motion, without holding a hearing, and filed the following memorandum opinion:

* The following account by Judge Weinstein, at pages 410-41, was apparently not called to the attention of the author of the opinion in *United States v. Herman*, 544 F.2d 791 (5th Cir. 1977), upon which Schulz relies: "Nothing in the history of either Rule 410 or Rule 11(e)(6) indicates any intention to make inadmissible statements obtained during the investigatory stage."

Schulz' argument in this Court that the legislative history supports his interpretation is frivolous. Not one word appears anywhere that indicates that the Advisory Committee, the Congressional committees or Congress intended the Rule to apply to the grand jury stage; indeed, if anything, the House Committee's explanation of its amendment, adding the exception for sworn statements in the presence of counsel, evidences an intention that the Rule as a whole applies only to the actual allocution statements in open court.

In addition, the House Committee noted, with respect to the addition of the final sentence in Rule 11(e)(6) as finally adopted, that while the addition might "result in discouraging the reaching of plea agreement [, t]he Committee believes that, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness." The adoption of Schulz's reading of the rule would, of course, promote not only manipulation of the rule but also the precise "deceit and untruthfulness" Congress sought to avoid.

"The movant seeks suppression of grand jury testimony he gave voluntarily, for his own good, at a time when he had agreed to plead guilty to one count. The movant changed his mind about pleading. Now he says Fed. R. Crim. 11(e)(6) forbids use of sworn testimony. The argument strains the language and purport of the Rule. The position, especially in the circumstances of this case, has no basis in policy or significant precedent. The Government never agreed that the sworn testimony would be suppressed under any circumstances. The Rule compels no such result. The motion to suppress will be denied." (ScApp. 96).

B. The renewal of the motion during the trial.

During the trial, Judge Frankel, granting Schulz' motion for reconsideration, held a hearing on the admissibility of the Grand Jury record alone since this was all the government then intended to offer. Schulz was the only witness at the hearing. He testified that he had not had any of the terms of the written agreement interpreted to him by the Government or by his own counsel. (ScApp. 120-22; Tr. 2030-02). In addition, and quite apart from the terms of the written waiver, he admitted that he had been explicitly orally reminded at the outset of the grand jury session that there was a "possibility" that his testimony could later be used against him. (Sc.App 112; Tr. 20). At this point, Judge Frankel reaffirmed his earlier ruling, dictating further grounds into the record. First, he sustained the Government's contention that Schulz lost all protection of the written agreement by breaching the undertakings contained in it, to wit, to provide future truthful information, to commit no further crimes and to plead guilty to the conspiracy charge. By his own testimony, Schulz deliberately sought to falsify his answers to the first four ques-

tions in the grand jury about his own prior false exculpatory statements,* and, more fundamentally, by backing out of the other two undertakings to plead guilty and to provide truthful information. (ScApp. 124-27, 131). Second, Judge Frankel found that the interpretation of Rule 11(e)(6) sought by Schulz would work "evil consequences" in the "sense that it would lend the grand jury process and the informational process in dealing with the Government" subject "to all kinds of deceptive and manipulative and misleading uses". Finally, he found that the written agreement governed the situation by providing that the grand jury testimony could be read to the trial jury if Schulz backed out of the agreement. (Tr. 2034 and 2041).**

C. Discussion.

Judge Frankel was clearly correct in perceiving that Schulz' interpretation, if accepted, would radically change the utility of the grand jury and the relationship of the

* Claiming, of course, that he had been suborned to do so by the Assistant United States Attorney.

** "Now, on this letter agreement of July 8, 1976, there is a statement of understanding that if Mr. Schulz commits any further crimes or the U.S. Attorney judges that he has given false testimony, whether it is false or not, 'or has otherwise violated any prohibition in this agreement, this agreement shall be null and void and the information provided by Mr. Schulz may thereafter be used against him.'"

* * * * *

"Secondly, whatever Rule 11-E would say otherwise, I agree with the Government that the plea agreement in this case contemplated—I haven't seen any testimony that anybody ever believed that it was [sic: "that it was" should be "otherwise"]—that if the defendant breached it, represented that things said under oath and otherwise presumably the truth could be used against him later on as the Government proposes to do in this case." (ScApp. 124, 131; Tr. 2034, 2041).

Government to persons testifying before it, and, more generally, would create avenues for manipulation wholly unintended by Congress. At the extreme, a grand jury witness could deliberately submit perjured testimony in order to harm or benefit others, not to mention himself,* and keep that testimony from being admissible against him in any criminal proceeding merely by entertaining "discussions" about pleading guilty at the same general time as the appearance. Currently, such an individual is encouraged toward truthfulness by the combined threats of prosecution for perjury before the grand jury as well as on the immunized matters. If all sanctions are removed no responsible decisions by the prosecutor or the grand jury could ever be based upon such testimony precisely because the hardest sort of information would have been rendered virtually useless.** Clearly, Judge Frankel was correct in declining to attribute to Congress, without a word in the legislative history so much as mentioning the grand jury, any intention to work such changes in the grand jury deliberative process under the guise of encouraging plea bargains.

* Indeed, somebody who had bargained for an agreement to plead to a limited charge, could falsely deny to the grand jury having committed any more culpable offenses, await the filing of the indictment omitting the more culpable offenses and the running of the statute of limitations and then back out to obtain a trial as to the reduced indictment only.

** Moreover, Schulz' suggestion—that the cooperating witness be moved out of the grand jury room into the prosecutor's office and there examined in the presence of his counsel under oath—would work an even more radical change by depriving the grand jury of the benefit of hearing the testimony of the witness directly, while observing his demeanor. See *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). In addition, of course, this proposal raises difficult questions of whether a perjury prosecution made 18 U.S.C. § 1623(a) would be permissible under those circumstances.

Schulz as much as concedes this by alternatively arguing that "an explicit waiver" (ScBr. 49) might preserve the established modes of obtaining sworn testimony. Here the District Court found that Schulz did exactly that. Of course, Schulz argues (as he must) that the record does not support Judge Frankel's finding of a waiver because Schulz did not "know" about Rule 11(e) (6) and further did not know that the written agreement would permit his statement to be used against him if he ceased to perform his undertakings. (ScBr. 50-51). This argument is frivolous in light of Judge Frankel's having actually heard Schulz' testimony that he always understood his constitutional right to refuse to answer questions, that his decision to waive it by testifying was only arrived at on the advice of his two counsel (including a former Assistant United States Attorney), and that he had read, wholly without any governmental interpretation,* the written plea agreement and agreed to be bound by each of its terms, including the explicit proviso that in the event of a default, Schulz' statements "may be used against him" (ScApp. 124, 116-22; Tr. 2034, 2026-33). The only "torturing" of this plain language, clearly intended to warn persons such as Schulz and his counsel that all defaults give rise to the possibility that the statements might "be used against him", is Schulz' argument that it be limited to the situation where a cooperating

* Schulz' brief suggests that some narrowing of the written agreement's terms may have resulted from his having been warned at the outset of the grand jury testimony that there still existed "the possibility that some day" his statements could be used against him because the entire agreement was not read before the grand jury and the penultimate paragraph was omitted from the several provisions referred to in the summary. (ScBr. 36-38; ScApp. 50-53). However, Judge Frankel properly declined to make such a finding after hearing Schulz' testimony that he in no way construed the "possibility" warning as narrowing anything. (ScApp. 112; Tr. 2022).

individual partially performs, by pleading guilty, and then refuses to testify against others. Here, as Judge Frankel found, Schulz understood the agreement and that he bore the risk, if he didn't fulfill it, that his statements might "be used against him" in every permissible manner.*

In sum, Judge Frankel was clearly correct in his construction and interpretation of both Rule 11 and of the written waiver proviso in the plea agreement. Schulz was fairly treated at all times, was never the recipient of any governmental misadvice, and, in the final analysis, simply elected to stand trial fully realizing the risk that his grand jury testimony would "be used against him".

* This point serves both to distinguish the facts of this case from those of *United States v. Herman, supra*, upon which Schulz relies, and to underscore the inapplicability of the policy concerns underlying Rule 11(e)(6) to this case. In *Herman*, the defendant made several statements at a time when he was attempting to decide whether to plead guilty and to negotiate the best deal for himself. In language that was unnecessarily broad to decide the issue, the Fifth Circuit held that since the statements were literally made "in connection with, and relevant to" the guilty plea, they were inadmissible under the Rule. In particular, it noted that the important policy concern of encouraging guilty pleas and plea negotiations required expansive reading of the rule, or otherwise the Government could "sand-bag" a defendant into making admissions. Here, of course, the statements were made—under oath and at the grand jury—after Schulz had decided whether or not to plead guilty, and indeed, after a formal plea agreement had been entered. Thus, use of the statements simply could not chill Schulz'—or anyone else's—willingness to enter negotiations in the future.

Finally, in *Herman*—where the Government appealed an adverse determination in the District Court—the Court noted that with respect to the factual determination of whether a statement is plea-related, "only in an egregious case would we overturn such a district court finding." 544 F.2d at 799. Judge Frankel's explicit finding in this case was not only not egregious, it was obviously correct.

POINT VI

The District Court Did Not Err In Instructing The Jury.

A. There was no error in the court's charge on credibility of witnesses and the interest of those who testify.

Defendants David Stirling, Jr., William G. Stirling, and Harold M. Yanowitch contend that Judge Frankel committed reversible error by telling the jury that they might well have heard perjury in the course of the trial because, defendants claim, this remark was directed at their testimony.* SBr. 48-50; YBr. 54-56. This claim must fail both because no objection was made at trial and because the instruction worked no prejudice against the defendants.

The Government submitted to the Court and served on the defendants requests to charge pursuant to Rule 30, Fed. R. Cr. P. Requests No. 25 and 26 dealt with the credibility of witnesses and the interest of those who testify. The substance of the language now complained of by the defendants was included in those requests.

Both the issue of perjury and the interest of the defendants in the outcome of the case was directly raised:

This brings us to the classic assignment of jurors. It is very possible that you have heard perjury in this case. It happens in a courtroom. At the very least you have heard sharp conflicts in the evidence (From Request 25, credibility).

* * * * *

* Curiously, although William Stirling makes this argument, he did not testify at trial.

In this case defendants have taken the stand and testified. The interest of a defendant in the outcome of the case is deep and obvious. You will take this into account together with all the other circumstances in deciding to what extent you may credit his testimony. (From Request 26, interest).

Pursuant to Rule 30, Judge Frankel informed the parties of how he would charge the jury. He granted the Government's requests No. 25 and 26 in substance. (Tr. 5501-4). See *United States v. Conlin*, 551 F.2d 534, 539 (2d Cir. 1977). No objection was taken at that time by defendants as to the instruction on perjury, on the interest of the defendants or any other part of those two requests. Judge Frankel did in fact charge the substance of the Government's two requests. (Tr. 6068-72). No objection to this charge was taken by the defendants. (Tr. 6081-85). Defendants are therefore barred by the terms of Rule 30 from raising an objection to the charge in this Court. *United States v. Nathan*, 536 F.2d 988, 992 (2d Cir.), *cert. denied*, 97 S. Ct. 337 (1976); *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

Judge Frankel's charge was, in any event, fair and proper. It is clear from reading the entire charge dealing with credibility of witnesses that the trial judge was talking generally and not of any particular witnesses. The instruction was certainly proper in a case where, to take only one example, there had been dramatically opposing accounts of the relevant events provided by W. T. Richardson and Rubel L. Phillips and the witnesses called on his behalf.

It is well-established law that a judge may go far beyond the general comments made by Judge Frankel here. A trial judge may directly comment on the testimony of

witnesses and give the jury his opinion of their veracity so long as it is clear that the jury need not agree with him and that it is the final judge of the facts. *United States v. Lombardi*, 550 F.2d 827, 829 (2d Cir. 1977). The trial court did not exercise that power in this case; the judge acted clearly within the bounds of propriety by focusing the jurors' attention on the important matters for their decision without taking from them their role as sovereign finders of the fact or placing any legal authority behind any opinion expressed on the facts. *United States v. Cheung Kin Ping*, Dkt. No. 76-1362, slip op. 2063, 2068-69 (2d Cir., Feb. 28, 1977); *Quercia v. United States*, 289 U.S. 466, 469 (1933). Here, the question of credibility was unmistakably left to the jury and the charge did not smack of a direction by the court as to whom to believe. The trial judge plainly stated that nothing he said should suggest his view on the questions to be decided (Tr. 5970, 5971) and made it clear that the question of credibility was for the jury alone. (Tr. 6068-69, 6073).*

A charge as to defendants' interest, coupled with an admonition as here given, that "the fact that somebody is interested doesn't mean he is lying", (Tr. 6072), has been repeatedly upheld as appropriate. *United States v. Floyd*, Dkt. No. 76-1462, slip op. 3495, 3498-99 (2d Cir., May 16, 1977); *United States v. Tolkow*, 532 F.2d 853, 859 (2d Cir. 1976); *United States v. Martin*, 525 F.2d 703, 706 (2d Cir.), *cert. denied*, 423 U.S. 1035 (1975); *United States v. Mahler*, 363 F.2d 673, 678 (2d Cir.

* Defendants misplace their reliance on *United States v. Cisneros*, 491 F.2d 1068 (5th Cir. 1974), for the proposition that a general statement that "somebody is lying" is prejudicial error. The court there found the comment an apt characterization in light of irreconcilable conflicts in the testimony. The judge erred in his following analysis of a specific witness and his gestures to the defendant which had the effect of adding credibility evidence that may have otherwise gone unnoticed. *Id.* at 1075.

1966); *United States v. Sullivan*, 329 F.2d 755, 756-57 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964). There was no impingement on the exercise of the jury's independent judgment on witness credibility in this case.

B. The instruction to the jury on the defense of reliance on experts was fair and proper.

Defendants David Stirling, Jr., William G. Stirling and Harold M. Yanowitch argue that the charge given by the district judge on the issue of reliance on experts was erroneous. StBr. 39-43, YBr. 46-50. The instruction met all the requirements of law and defendants' argument is without merit.*

Defendants' argument is couched in terms of the court's failure to give the charge which they requested on outside experts. StBr. 41; YBr. 48. Any reading shows that the request set out in defendants' briefs has nothing to do with reliance on the expert advice of attorneys or accountants; rather, it refers solely to the issue of defendants' knowledge of the corporation's business affairs. This is particularly obvious when the quoted language is read in its context of addressing the question of whether or not the defendants are responsible for the statements and representations at issue in the trial. (St-Y App. 144-

* William G. Stirling did not testify in his own defense. He therefore did not put before the jury evidence as to the information he provided to outside experts, such as lawyers and accountants, or as to his reliance on such advice; he was not entitled to any charge on this issue. *See Bisno v. United States*, 299 F.2d 711, 720 (9th Cir. 1961), *cert. denied*, 370 U.S. 952 (1962); *United States v. Hickey*, 360 F.2d 127, 142 (7th Cir.), *cert. denied*, 385 U.S. 978 (1966). David Stirling, Jr., was not entitled to the charge either; despite two admonitions from the court for him to focus on exactly what he had told the outside experts, he was unable to give more than gross generalities which did not give the jury a sufficient basis on which to make a judgment as to his claimed defense. (Tr. 4145-46, 4161-62).

48). Thus, the defendants have failed to direct the Court to any request proffered by them in support of the claim they now make.

Their central claim is that they were entitled to a charge that if the corporation's attorneys, accountants and labor experts had failed to ask them appropriate questions, they could not be held liable for the omissions and false statements contained in the documents produced after consultation with those experts. This proposition misconstrues the relevance of reliance on expert opinion. Evidence of reliance on expert opinion is no more than one aspect of a defense of good faith and is put before the jury to negate the charge that the defendants acted wilfully and knowingly. *United States v. Tolkow, supra*, 532 F.2d at 856-57; *Linden v. United States*, 254 F.2d 560, 568 (4th Cir. 1958); see *United States v. McCormick*, 67 F.2d 867, 870 (2d Cir. 1933), *cert. denied*, 291 U.S. 662 (1934). The defense is not intended to shift the responsibility for the completeness and fairness of the statements to the lawyers or accountants unless they had all the information available to them. The responsibility for the statements to the SEC and the investing community is that of those with knowledge of the facts and not that of their partially informed experts. *United States v. Smith*, 523 F.2d 771, 728 (5th Cir. 1975) (claimed negligence on part of accountant in failing to discover irregularities held irrelevant; "[t]he fact that material is not intentionally hidden fails to meet the requirement that it be fully disclosed"); *In re Soroko*, 34 F. Supp. 825, 826 (S.D.N.Y. 1940). Defendants were not entitled to the jury instruction they now claim.*

* The evidence was, of course, overwhelming that defendants did not disclose to their outside experts—lawyers, accountants or labor relations specialists—all the material facts of Homex's affairs. (Tr. 3242-3336 *passim* (William J. Murray, partner, Peat, Marwick & Mitchell); 5374-78 (Theodore W. Kheel, counsel on labor relations); 5414-17 (Allan Kramer, formerly partner Shea, Gould, Climenko & Kramer, counsel to Homex)). The jury was thus fully justified in rejecting the good faith defense.

POINT VII**There Were No Errors In The Evidentiary Rulings Of The Trial Judge.**

- A. The District Court did not err in excluding testimony as to whether or not the Greater Gulf Coast Housing Development Corp. operated in a "usual" manner.**

Defendants David Stirling, Jr., William G. Stirling and Harold M. Yanowitch claim that they were prejudiced by the court's barring questions to J. Rubel Griffin as to whether or not unspecified "critical practices" connected to the Greater Gulf Coast Development Corporation were usual or not. StBr. 51-52; YBr. 57-58. The court's ruling was proper and the defendants were not prejudiced.

First, it was irrelevant to the issues before the jury whether or not Greater Gulf Coast operated in a "usual" manner. The issue for jury determination was whether or not the material facts as to Homex's control of Greater Gulf were disclosed; that was not dependent on whether or not the activities of Greater Gulf were usual. For this reason Judge Frankel properly barred the questions to Judge Griffin under Rules 401 and 402, Fed. R. Evid.

In addition, the actual questions put to Judge Griffin by Yanowitch's counsel were largely a waste of time. They dealt, for instance, with the undisputed facts that in Mississippi the Farmer's Home Administration frequently financed single family houses and dealt with projects of more than one house. (Tr. 1900-06). If the opinion testimony sought by the defendants was, *arguendo*, relevant, it was properly excludable under Rule 403, Fed. R. Evid., as unfairly prejudicial and a waste of time.

The particular instruction by Judge Frankel is best seen in context: counsel had repeatedly asked witnesses, despite previous instructions not to, whether in their opinion what they had done was "wrong", "misleading", "proper", "improper", "ethical", etc. (*E.g.*, Tr. 825, 838, 843-47, 1145, 1328, 1332, 1340, 1350-51). Thus, when counsel asked Judge Griffin to characterize something as "normal," he violated these previous strictures. In these circumstances the testimony could properly be excluded under Rule 403, particularly where as here it would come from a sitting judge with the improper suggestion of greater weight and credibility than might otherwise be the case. *Cf. Lindsey v. United States*, 237 F.2d 893 (9th Cir. 1956); *Weinstein's Evidence*, ¶ 403[04].

The admission of such evidence is clearly assigned to the discretion of the District Court, *United States v. Cheung Kin Ping*, Dkt. No. 76-1362, slip op. 2063, 2071 (2d Cir., Feb. 28, 1977); *Hamling v. United States*, 418 U.S. 57, 124-27 (1974); as this Court has recently noted, the power of the District Court to exclude even relevant evidence for prejudice or waste of time is no less where the evidence is offered by a defendant. *United States v. Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976).

B. The evidence of a possible sale, on the eve of bankruptcy and months after the last financial statement in issue, was properly excluded.

Both of the Stirlings and Yanowitch argue that the trial court erred in excluding Daniel Wind as a defense witness because he would have established that in late June 1972 he was negotiating with Homex on behalf of the State of Israel for a \$2.5 million purchase of modules. This was necessary, so the proffer went, because a prosecution witness, Dienstag, had suggested "that there were few if any viable projects in the works at that time."

(StBr. 51; YBr. 57; Tr. 4373). The argument is frivolous.

The Dienstag evidence consisted of a February 29, 1972, memorandum warning both of the Stirlings and Yanowitch that approximately a dozen projects, previously recognized as approximately \$35,000,000 of income and then being carried as receivables, had become so stale that adjustments were required before filing the SEC form 10Q for the six months ended January 31, 1972—the last financial statement which the Government asserted as false and misleading. (GX 612; Tr. 2902-07). An extensive defense attack had been permitted on the accuracy of the memorandum as to each of those projects by allowing Newman Evans, a former Homex employee and current Stirling aide, to testify about their history both before and after the date of the memorandum. (Tr. 3670-3908).

Thus, the record is simply contrary to the current argument, made without citation, that the Government went beyond these several older projects to argue or suggest that Homex had no viable sales prospects on the eve of bankruptcy. Indeed, the jury was repeatedly told during the Government's summation that Homex had made numerous genuine sales and that it was only the criminal excesses that had been included in the indictment. (Tr. 5906, 5949-51).

C. There was no abuse of discretion in limiting surrebuttal.

Both Stirlings and Yanowitch claim that the trial court erred in excluding Peter Turzik as a surrebuttal witness because he would have established that Theodore Kheel had falsely testified in rebuttal that he had "never arranged for the purchase of Homex stock" by UBCJA

officials. This ruling, the argument continues, allowed the government in summation to argue improperly "that the defense had been unable to call any Carpenter's Union officials to rebut Kheel." (StBr. 51; YBr. 27). Both arguments are frivolous.

The indictment charged that seven UBCJA officials had had Homex stock purchased and sold on their behalf and to their advantage. The government's evidence-in-chief proved that seven specific UBCJA officials had had stock purchased for their accounts at Pressprich through the Central Trust Co. loans. Turzik was not one of them.

During his cross-examination, Kheel—a rebuttal witness—was asked if he knew Turzik and, if so, who he was. Kheel responded that he did and that he was a UBCJA official "who retired, I believe, some time in this period that you are asking me about." (Tr. 5395). He was then asked if he ever arranged to purchase any Homex stock "from" Turzik, and he responded that he had not. He was next asked if he ever offered "to arrange stock for him in Homex" to which he responded, that he did not recall having done so. At this point, the cross-examiner completed the line by reading three questions and answers from Kheel's previous grand jury testimony which proved only that Kheel then had no recollection, although he had acknowledged during that proceeding the possibility that he and Turzik may have once discussed the latter's purchasing stock through Pressprich at the \$16.50 original underwriting price, "but there is no possibility that I talked to him in March about buying stock at \$30 a share." (Tr. 5396-97). Thereafter, upon completion of its rebuttal case, the Government moved to preclude Turzik as a surrebuttal witness because he was not one of the seven UBCJA officials charged in the indictment and his name had not appeared on the David Stirling loan guarantee letter. (Tr. 5452). As the

resulting offer of proof did not go beyond a desire to contradict Kheel's earliest answer that he had not arranged for Homex stock "from" Mr. Turzik, Judge Frankel said that in the exercise of his discretion he would exclude such proof. (Tr. 5453).

The District Court was plainly justified, assuming a flat contradiction, in declining to permit a surrebuttal witness on a wholly collateral matter unrelated to bias or interest. *United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976); *United States v. Kahn*, 472 F.2d 272, 279-80 (2d Cir.), *cert. denied*, 411 U.S. 482 (1973); *United States v. Blackwood*, 456 F.2d 526, 529-31 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972); *United States v. Haggett*, 438 F.2d 396, 399 (2d Cir.), *cert. denied*, 402 U.S. 946 (1971); *United States v. Lester*, 248 F.2d 329, 334 (2d Cir. 1957); *F. W. Woolworth Co. v. Contemporary Arts*, 193 F.2d 162, 166-67 (1st Cir. 1951), *aff'd*, 344 U.S. 228 (1952); 6 *Wigmore* § 1874).^{*} Indeed, even if the proffer were viewed as a direct offer to show that Kheel himself had violated the Taft-Hartley Act, by directing March stock at \$34.00 to a non-retired UBCJA official having something to do with Homex, such proof would still be excluded under Fed. R. Evid. 608(b).^{**}

^{*} The evidence would have been cumulative in any event since Kirkland contradicted Kheel on his own purchases, another collateral matter.

^{**} The Government's summation, contrary to the mischaracterization by the defendants, was directed narrowly at explaining to the jury that only seven men were charged in paragraph 15 and that Kirkland had nothing to do with them. Even assuming that Turzik should have been included in the indictment as another non-retired UBCJA official obtaining Homex stock at special, advantageous prices, the Government would still be permitted to argue that the original seven should have been disclosed and that Kirkland was a red herring. In point of fact, this is precisely what was argued, without objection. (Tr. 5575-6).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ANGUS MACBETH,
W. CULLEN MACDONALD,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

W. CULLEN MAC DONALD being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 10th day of June, 1977
he served a copy of the within
by placing the same in a properly postpaid franked
envelope addressed:

All counsel of record.

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

W. Cullen Mac Donald

Sworn to before me this

10th day of June, 1977

Alma Hanson
ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978